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98-9183

No. 98-9183-CSY Title: Jeffrey Steven Marx, Petitioner
v.
Texas
Docketed: Court: Court of Criminal Appeals of Texas
May 3, 1999

Entry	Date	Proceedings and Orders
	Apr 30 1999	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due August 4, 1999)
	May 24 1999	Waiver of right of respondent Texas to respond filed.
	Jun 2 1999	DISTRIBUTED. June 17, 1999
	Jun 3 1999	Response requested. (Due July 5, 1999 - NONE RECEIVED)
	Jun 29 1999	Order extending time to file response to petition until August 4, 1999.
	Aug 4 1999	Brief of respondent Texas in opposition filed.
	Aug 19 1999	REDISTRIBUTED. September 27, 1999
	Sep 17 1999	Record requested.
	Oct 6 1999	Record filed.
	Oct 14 1999	REDISTRIBUTED. October 29, 1999
	Nov 1 1999	REDISTRIBUTED. November 5, 1999
	Nov 8 1999	REDISTRIBUTED. November 12, 1999
	Nov 19 1999	REDISTRIBUTED. November 24, 1999
	Nov 29 1999	Petition DENIED. Dissenting opinion by Justice Scalia with whom Justice Thomas joins. (Detached opinion.)
		**********
	Dec 3 1999	Record returned to Court of Criminal Appeals District Court of LLano County, Texas- 1 box

EDITOR'S NOTE

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98-9183

NO. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

JEFFREY STEVEN MARX,

Petitioner

v.

STATE OF TEXAS,

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE TEXAS COURT OF CRIMINAL APPEALS

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SUPREME COURT, U.S.

98-9183

Marx
v.
Texas

QUESTIONS PRESENTED

I.

Whether Article 38.071 of the Texas Code of Criminal Procedure, as applied to Jeffrey Steven Marx at his trial, violated his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution made applicable to the states by the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that the Trial Court allowed, under Article 38.071, a non-victim witness to testify via closed-circuit television when the record evidence clearly demonstrated that the closed-circuit procedure was not necessary to protect the witness from further emotional trauma.

II.

Whether Article 38.071 of the Texas Code of Criminal Procedure is facially unconstitutional since the use of closed-circuit testimony denies a Defendant his right to be presumed innocent as guaranteed him by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

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I.

ARTICLE 38.071 OF THE TEXAS CODE OF CRIMINAL PROCEDURE, AS APPLIED TO JEFFREY STEVEN MARX AT HIS TRIAL, IS UNCONSTITUTIONAL IN THAT IT DENIED HIM HIS RIGHT "TO BE CONFRONTED WITH WITNESSES AGAINST HIM" AS GUARANTEED HIM BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE TRIAL COURT ALLOWED, UNDER ARTICLE 38.071, A NON-VICTIM WITNESS TO TESTIFY VIA CLOSED-CIRCUIT TELEVISION EVEN THOUGH THE RECORD EVIDENCE CLEARLY DEMONSTRATED THAT THE CLOSED-CIRCUIT PROCEDURE WAS NOT NECESSARY TO PROTECT THE WITNESS FROM FURTHER EMOTIONAL TRAUMA.

II.

ARTICLE 38.071 OF THE TEXAS CODE OF CRIMINAL PROCEDURE IS FACIALLY UNCONSTITUTIONAL SINCE ALLOWING CERTAIN WITNESSES TO TESTIFY VIA CLOSED-CIRCUIT TELEVISION, OUTSIDE A DEFENDANT'S PRESENCE, DENIES THAT DEFENDANT HIS RIGHT TO BE PRESUMED INNOCENT AS GUARANTEED HIM BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

JEFFREY STEVEN MARX,

Petitioner

v.

STATE OF TEXAS,

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE TEXAS COURT OF CRIMINAL APPEALS

Petitioner, Jeffrey Steven Marx, prays that this Honorable Court issue a Writ of Certiorari to review the judgment of the Texas Court of Criminal Appeals in his case. The caption contains all parties to the proceeding. See Sup. Ct. R. 14.1(b).

CITATIONS TO OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals on submission of the direct appeal is reported at _____ S.W.2d _____ (Tex. Crim. App. 1999); 1999 WL 47377. Appendix A. The opinion of the Texas Court of Appeals, Third District,

at Austin, on submission of the direct appeal is reported at 953 S.W.2d 321 (Tex. App. - Austin 1997). Appendix B.

JURISDICTION

The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS

This petition involves the application of the Sixth and Fourteenth Amendments to the United States Constitution. These amendments are included as Appendix C.

STATEMENT OF CASE

On February 3, 1999, the Texas Court of Criminal Appeals upheld Jeffrey Steven Marx's conviction for Aggravated Sexual Assault of a Child. Marx v. State, _____ S.W.2d _____ (Tex. Crim. App. 1999); 1999 WL 47377. The decision to uphold the conviction was five to four. Four Justices, in dissent, held that the Trial Court's use of closed-circuit television, for one specific non-victim witness, in this particular case, violated Mr. Marx's right to confront witnesses against him as guaranteed him by the Sixth Amendment to the United States Constitution and made applicable to the states by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

During the trial, the Trial Court allowed two witnesses to testify via closed-circuit television: (1) B.

J., a 13-year old girl who was the named victim in each count of the Indictment, and (2) J. M., a 6-year old girl who was an alleged witness to the offenses. The Jury acquitted Mr. Marx as to Counts Two and Three of the Indictment, but found Mr. Marx guilty as to Count One of the Indictment. The Jury assessed punishment at 23 years confinement in the Texas Department of Criminal Justice, Institutional Division.

Petitioner appealed his conviction to the Texas Court of Appeals, Third District, at Austin. Marx v. State, 953 S.W.2d 321 (Tex. App. - Austin 1997). The Austin Court of Appeals upheld the conviction. Id. Petitioner timely filed Petitioner's Petition for Discretionary Review in the Texas Court of Criminal Appeals and such Petition for Discretionary Review was granted on November 26, 1997. Oral argument was heard in the Texas Court of Criminal Appeals and Petitioner's conviction was upheld by the Texas Court of Criminal Appeals, five to four, on February 3, 1999. Marx v. State, _____ S.W.2d _____ (Tex. Crim. App. 1999); 1999 WL 47377.

In the Texas Court of Criminal Appeals, Petitioner complained that the use of such closed-circuit testimony, with respect to these two witnesses, denied him his Sixth Amendment right to confront witnesses against him.

Additionally, Petitioner argued that the use of such testimony would impair his right to the presumption of innocence as guaranteed him by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

A majority of the Texas Court of Criminal Appeals, writing through Justice Mansfield, held that allowing B.J. and J.M. to testify in this manner did not violate the confrontat n clause. Four Justices, however, disagreed, with respect to the witness J.M. Justice Holland, in a dissenting opinion in which Justice Womack and Justice Johnson joined, stated, "I cannot agree with the majority, however, that the evidence supports the district court's decision to permit J.M., a 6-year-old witness, to testify via closed-circuit television. I would hold permitting J.M. to testify via this exceptional procedure violated appellant's rights under the Confrontation Clause of the Sixth Amendment." Id. at p. 2, Holland, J., dissenting. Likewise, Justice Keller, in a separate dissenting opinion stated, "I agree with the majority that using the closed-circuit procedure was constitutionally permissible for B.J.'s testimony. I disagree with the majority, however, regarding the testimony of J.M. Use of the closed-circuit procedure for her testimony violated the Confrontation Clause." Id. at p. 2, Keller, J., dissenting. Both Justice

Holland's and Justice Keller's dissenting opinions are replete with record evidence demonstrating that the closed-circuit procedure was not necessary to protect J.M. from further emotional trauma. As such, Justice Holland, Justice Womack, Justice Johnson and Justice Keller all agreed that Article 38.071, as it applied to Petitioner in this case, violated Petitioner's Sixth Amendment right to confront witnesses against him.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

ARTICLE 38.071 OF THE TEXAS CODE OF CRIMINAL PROCEDURE, AS APPLIED TO JEFFREY STEVEN MARX AT HIS TRIAL, IS UNCONSTITUTIONAL IN THAT IT DENIED HIM HIS RIGHT "TO BE CONFRONTED WITH WITNESSES AGAINST HIM" AS GUARANTEED HIM BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE TRIAL COURT ALLOWED, UNDER ARTICLE 38.071, A NON-VICTIM WITNESS TO TESTIFY VIA CLOSED-CIRCUIT TELEVISION EVEN THOUGH THE RECORD EVIDENCE CLEARLY DEMONSTRATED THAT THE CLOSED-CIRCUIT PROCEDURE WAS NOT NECESSARY TO PROTECT THE WITNESS FROM FURTHER EMOTIONAL TRAUMA.

Article 38.071 of the Texas Code of Criminal Procedure allows certain witnesses to testify in certain specific proceedings via closed-circuit television. Article 38.071, Section 1, provides, in relevant part:

> This article applies only to a proceeding in the prosecution of [certain specified sex and assaultive offenses, including aggravated sexual assault of a child] if the offense is alleged to have been committed against a child 12 years of age or younger and if the trial court finds that the child is unavailable to testify at the trial of the offense,

and applies only to statements or testimony of that child.

Id. at p. 9.

Since B.J., the alleged victim of this offense, was 13 years old at the time of her testimony and since J.M. was not the alleged victim of this offense, Petitioner had originally complained that there was a statutory violation, as well as the constitutional violations for which Petitioner herein complains. The majority of the Texas Court of Criminal Appeals, in holding that allowing both of these witnesses to testify through closed-circuit television did not violate the confrontation clause, also held that Article 38.071 did not statutorily prohibit the admission of closed-circuit television testimony of both such witnesses. Id. at p. 10. Four dissenters, however, disagreed with respect to the witness J.M. and held that allowing J.M. to testify via closed-circuit television in this particular case, violated Petitioner's right to confront witnesses against him.

The Supreme Court addressed a Defendant's right o confront witnesses against him in light of closed-circuit testimony in Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). In Craig, the Supreme Court ruled, five to four, that the procedure used to allow

witnesses to testify via closed-circuit testimony in Maryland v. Craig did not violate the Confrontation Clause of the Sixth Amendment. It is important to note, however, that Craig dealt only with the testimony of child abuse victims. Justice O'Connor, writing for the majority, stated, "We have, of course, recognized that a State's interest in 'the protection of minor victims of sex crimes from further trauma and embarrassment' is a 'compelling' one." Id., 110 S.Ct. at 3167 (emphasis added). Justice O'Connor and the majority concluded that the State had a compelling interest in protecting sex crime victims. This alternative way of testifying with respect to these particular witnesses, therefore, was constitutionally permissible. Justice O'Connor stated, "We likewise conclude today that a State's interest in the physical and psychological well being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in Court. Id. (emphasis added).

The record in this case is clear. J.M. was not the victim of this offense. Furthermore, a careful reading of the record evidence as contained in Justice Holland's and Justice Keller's dissenting opinions, clearly demonstrates that an elaborate procedure such as testimony via closed-

circuit television was not necessary to protect J.M. from further emotional trauma.

To Petitioner's knowledge, the Supreme Court has not addressed whether allowing non-victim witnesses, when there is no showing of further emotional trauma, to testify via closed-circuit television is constitutionally permissible as not violating an accused's right to confront witnesses against him. This writ should be granted in order for the Supreme Court to reexamine its holding in Maryland v. Craig, and for the Supreme Court to examine how far they are going to allow that holding to be expanded. In other words, are non-victim witnesses going to be allowed to testify in this elaborate manner without violating an accused's rights under the Sixth and Fourteenth Amendments to the United States Constitution. The record evidence in Craig clearly demonstrated further emotional trauma to the testifying witnesses. This writ should be granted so that the Supreme Court can decide whether Craig will be expanded to mean that non-victim witnesses will be allowed to testify in this manner, even upon a record showing of no further emotional trauma, without violating an accused's right of confrontation.

In Danner v. Kentucky, 119 S.Ct. 529 (1998), the Supreme Court denied a Petition for Writ of Certiorari to

the Supreme Court of Kentucky in which Justices Scalia and Thomas dissented. In Danner, the witness that was allowed to testify by closed-circuit television was, again, the victim. Justice Scalia and Justice Thomas dissented in Danner because "this case, however, comes no where close to fitting within Craig's limited exception." Id. at 530. They believed that the record evidence in Danner, like Petitioner is urging here, did not demonstrate further emotional trauma to the witness. Justice Scalia, in arguing that certiorari should have been granted, stated, "Given Craig, however, it should be reviewed on certiorari and reversed to make clear that the exception we have created to the text of the Sixth Amendment is a narrow one. It is a dangerous business to water down the confrontation right so dramatically merely because society finds the charged crime particularly reprehensible. Indeed, the more reprehensible the charge, the more the defendant is in need of all constitutionally guaranteed protection for his defense." Id.

The record evidence here is similar to Danner in that the emotional trauma to the testifying witness was minimal. Here, however, there exists an even more compelling reason why a Petition for Writ of Certiorari should be granted. At least in Danner, the Court was dealing with a victim

testifying. In this particular case, J.M. was not the victim of the offense for which she was testifying against Jeffrey Steven Marx. Justice Scalia's dissent in Danner expresses a reluctance to expand Craig in situations where there is not a showing of further emotional trauma to the witness. Now, is the time for the Court to give Craig some parameters. Here, like Danner, we have no showing of further emotional trauma to the witness and the additional fact of the witness not even being the victim. If the Court does not grant this Writ of Certiorari, Craig will continue to be expanded in ways that violate the limited and narrow Craig exception to the confrontation right.

II.

ARTICLE 38.071 OF THE TEXAS CODE OF CRIMINAL PROCEDURE IS FACIALLY UNCONSTITUTIONAL SINCE ALLOWING CERTAIN WITNESSES TO TESTIFY VIA CLOSED-CIRCUIT TELEVISION, OUTSIDE A DEFENDANT'S PRESENCE, DENIES THAT DEFENDANT HIS RIGHT TO BE PRESUMED INNOCENT AS GUARANTEED HIM BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioner also asserted at Trial, in the Court of Appeals, Third Court, at Austin, and in the Texas Court of Criminal Appeals, that the use of closed-circuit televised testimony deprives criminal defendants of their constitutional guarantee to be presumed innocent under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Petitioner asserts that a jury

viewing this modified manner of testimony will necessarily infer, from the State's protection of the witness, that the Defendant must have harmed the witness in some way. As Petitioner's counsel stated at trial, "The only reasonable inference that the finder of fact can draw from the Trial Court allowing a witness to testify in this manner, is that the person on trial has abused the witness to such a degree that to allow the witness to testify in an ordinary manner would traumatize the witness even further." Marx v. State, _____ S.W.2d _____, p.7 (Tex. Crim. App. 1999). As the Austin Court of Appeals correctly pointed out, "Neither the Court of Criminal Appeals nor the United States Supreme Court has addressed this specific constitutional challenge." Marx v. State, 953 S.W.2d 321, 329 (Tex. App. - Austin 1999).

Since the United States Supreme Court has not addressed this specific constitutional challenge, this Petition for Writ of Certiorari should be granted in order to address Petitioner's claim that the entire closed-circuit television procedure, as outlined in Article 38.071 of the Texas Code of Criminal Procedure, is unconstitutional since it denies a defendant his right to be presumed innocent as guaranteed by the Due Process Clause in the Fourteenth Amendment to the United States

Constitution. This Court should grant this Petition for Writ of Certiorari and address this issue since it was not raised in Maryland v. Craig or addressed by any other previous United States Supreme Court. It appears obvious that the reason the State is implementing this procedure in the first place, is to protect a child from facing someone who has allegedly harmed that child in a very severe and serious manner. The only reasonable inference that the finder of fact can draw from that kind of elaborate procedure is that that child has been so harmed. It would follow that the Defendant's right to be presumed innocent is seriously and dangerously in jeopardy when such a procedure is employed.

CONCLUSION

The issues presented in this Writ of Certiorari demonstrate the Sixth and Fourteenth Amendment violations that contributed to Mr. Marx's conviction. Therefore, Petitioner, Jeffrey Steven Marx, respectfully prays that this Honorable Court grant this Writ and reverse his conviction for Aggravated Sexual Assault of a Child. In the alternative, Mr. Marx prays that this Court declare that Article 38.071 of the Texas Code of Criminal Procedure, as applied to Mr. Marx at his trial, is an unconstitutional violation of his Sixth Amendment right to

confront witnesses against him and reverse Mr. Marx's conviction for Aggravated Sexual Assault of a Child and remand the case to the Trial Court for further proceedings not inconsistent with this opinion. In the alternative, Mr. Marx prays that this Court declare that Article 38.071 of the Texas Code of Criminal Procedure is facially unconstitutional since it violates a Defendant's right to be presumed innocent as guaranteed him by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and reverse Mr. Marx's conviction for Aggravated Sexual Assault of a Child and remand the case to the Trial Court for further proceedings not inconsistent with this opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Petition for Writ of Certiorari has been mailed to the following persons by certified mail, return receipt requested on this 28th day of April, 1999:

Honorable Sam Oatman
District Attorney
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Llano, Texas 78643

The Honorable Matthew W. Paul
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F. N. "TREY" BROWN III

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 994-97

JEFFREY STEVEN MARX, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE THIRD COURT OF APPEALS BURNET COUNTY

MANSFIELD, J., delivered the opinion of the Court, in which McCORMICK, P.J., and MEYERS, PRICE, and KEASLER, JJ., joined. KELLER, J., filed a dissenting opinion. HOLLAND, J., filed a dissenting opinion, in which WOMACK and JOHNSON, JJ., joined.

OPINION

At appellant's trial for aggravated sexual assault of a child, two child witnesses testified via two-way closed circuit television, outside appellant's physical presence and over his objection. We granted appellant's petition for discretionary review to determine whether the admission of the child witnesses' testimony violated his rights under the Sixth and Fourteenth Amendments to the United

States Constitution and Article 38.071 of the Texas Code of Criminal Procedure.

The Relevant Facts

In August 1994, a Burnet County grand jury indicted appellant on three counts of aggravated sexual assault of a child. See Tex. Penal Code § 22.021(a)(1)(B)(i) & (2)(B). The named victim in each count was a thirteen-year-old girl, B.J. In April 1995, shortly before the case went to trial in the 33rd District Court of Burnet County, the State filed written motions in that court asking that B.J. and another girl, six-year-old J.M., an alleged witness to the offenses, be allowed to testify via two-way closed circuit television, outside appellant's presence. The State argued in the motions that the two girls, "if forced to testify in the presence and sight of the defendant, would suffer serious emotional and physical distress." The State argued further that the girls' closed circuit television testimony would be admissible under the Sixth Amendment, as interpreted in *Maryland v. Craig*, 110 S.Ct. 3157 (1990), and Article 38.071.[1]

The District Court held a pretrial hearing on the State's motions, at which hearing four witnesses testified. Pat Fluitt, B.J.'s teacher at Burnet Middle School, testified that B.J. had "learning disabilities" and read at a six-year-old's level. She testified further that B.J. had been "dreading" the possibility of testifying in appellant's presence and had "cried a couple of times" about it in class. Fluitt also testified that B.J. was "quite fearful" and that requiring her to testify in appellant's presence "would be a traumatic situation" for her.

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[1] Article 38.071 provides that, in certain specified circumstances, a child witness' testimony may be taken via videotape or closed circuit television, outside the defendant's presence. See generally 3 F. Maloney (ed.), *et al.*, *Texas Criminal Practice Guide* § 73B.02[5][d] (1997).

Barney Raines, B.J.'s grandfather, testified that B.J. was "sixty percent" mentally retarded. He also testified that she had "shown fear" and had told him that appellant had threatened her. Raines testified further that he believed B.J. would suffer emotionally and perhaps physically if required to testify in appellant's presence.

Crystal Hayden, J.M.'s mother, testified that J.M. was afraid of appellant but was nevertheless ready to testify in his presence. Hayden also testified, however, that J.M. was "real scared" and that she would probably be traumatized if required to testify in appellant's presence, even if her testimony related only to what appellant had done to B.J.

Finally, Dr. Anita Calvert, a licensed mental health therapist, testified that she had been counseling J.M. for an extended period of time because of appellant's many sexual assaults on her. Calvert testified further that J.M. was a "wreck," that she had had nightmares, and that she had suffered serious psychological damage, all because of what appellant had done to her. Calvert also testified that J.M. had demonstrated "extreme sexual knowledge" and had "inappropriately advanced males in [Calvert's] office," again because of what appellant had done to her. Finally, Calvert testified that, although J.M. was "a very strong little girl" and "would probably testify okay" in appellant's presence, she could not be certain of that.

Appellant objected to the use of closed circuit television testimony on both constitutional and statutory grounds. He argued first that use of such testimony would deny him his Sixth Amendment right to confront the witnesses against him. He argued second that use of such testimony would violate Article 38.071 "because [that statute] applies only to a victim of the offense for which the defendant is on trial, and the victim of that offense [must be] under [thirteen] years of age." Appellant pointed out that B.J. was thirteen years old and that J.M. was not the alleged victim of the

offense for which he was being tried.

At the conclusion of the hearing, the District Court found, as a matter of fact, that both B.J. and J.M. "would be traumatized by being required to testify in the defendant's presence" and that "the emotional distress ... would be more than a minimum." The court then rejected appellant's legal arguments without explanation and granted the State's motions for closed circuit testimony.

Shortly before B.J. and J.M. testified at the guilt/innocence stage of trial, appellant reiterated his previous objections to the use of closed circuit testimony and also argued, for the first time, that use of such testimony would impair his Fourteenth Amendment right to the presumption of innocence "because for a child to be presumed to be harmed [by testifying in his presence], then [one must] presume that this offense did, in fact, occur." The District Court rejected all of appellant's arguments, however, and, shortly thereafter, instructed the jury as follows:

> Ladies and gentlemen, I'm going to give you an instruction at this time. Our statutes provide that the testimony of children in these types of cases can be taken by what we call closed circuit television, and that is what's going to be taking place here for the next couple of witnesses. So we'll be seeing the witness on the closed circuit television, and [the attorneys] will be asking the witness questions from the podium there so that [the witness] can see the person who is asking the questions, and so forth. The rest of the procedure will go according to the Code of Criminal Procedure as we are bound by it, at any rate, and that will be the only change insofar as the testimony is concerned.

B.J. and J.M. then testified via two-way closed circuit television. The jury later convicted appellant of one count of aggravated sexual assault and assessed his punishment at imprisonment for 23 years.

On appeal, appellant reiterated the constitutional and statutory arguments discussed previously. The Third Court of Appeals, in a rather elaborate analysis, considered and rejected all of appellant's arguments and affirmed the District Court's judgment. *Marx v. State*, 953 S.W.2d 321 (Tex.App.--Austin 1997). We granted appellant's petition for discretionary review to determine

whether the Court of Appeals had erred. See Tex. R. App. Proc. 66.3(b) & (e).

The Right to Confrontation

We turn first to appellant's argument under the Sixth Amendment. That amendment provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." This right to confrontation was made applicable to the states by the Due Process Clause of the Fourteenth Amendment. *Pointer v. Texas*, 85 S.Ct. 1065, 1068 (1965).

"The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 110 S.Ct. at 3163. The Confrontation Clause reflects a preference for face-to-face confrontation at trial, but that preference must occasionally give way to considerations of public policy and the necessities of the case. *Id.* at 3165. Still, a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial *only* when denial of such confrontation is necessary to further an important public policy and the reliability of the testimony is otherwise assured. *Id.* at 3166. In particular, "if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant." *Id.* at 3169. The requisite *necessity* to justify the use of such a special testimonial procedure in a child abuse case may be shown if the trial court determines that use of the procedure is necessary to prevent significant emotional trauma

to the child witness caused by the defendant's presence. *Ibid.* The requisite *reliability* of the child witness' testimony may be assured absent a face-to-face encounter through the combined effect of the witness' testimony under oath (or other admonishment, appropriate to the child's age and maturity, to testify truthfully), subject to cross-examination, and the factfinder's ability to observe the witness' demeanor, even if only on a video monitor. *Id.* at 3170. See *Livelyy v. State*, 968 S.W.2d 363, 366-367 (Tex.Crim.App. 1998); *Hightower v. State*, 822 S.W.2d 48, 51 (Tex.Crim.App. 1991); *Gonzales v. State*, 818 S.W.2d 756, 760-762 (Tex.Crim.App. 1991).

Applying these settled principles to the case at bar, we discern no Sixth Amendment violation in the District Court's admission of the two-way closed circuit television testimony of B.J. and J.M. The District Court explicitly found, as a matter of fact, that the special procedure was necessary to protect both B.J. and J.M. from the significant emotional trauma of having to testify in appellant's physical presence, and the record evidence, discussed previously, reasonably supports that fact-finding.[2] See *Guzman v. State*, 955 S.W.2d 85, 89 (Tex.Crim.App. 1997). Furthermore, the requisite reliability of the children's testimony was assured because they testified after promising to do so truthfully, they were subject to cross-examination, and the jury was able to observe their demeanor.

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[2] We concede that the District Court's fact-finding with respect to J.M. is weakly supported by the record evidence, but we cannot say that that fact-finding is actually outside the zone of reasonable disagreement. In other words, we cannot say that the District Court clearly abused its discretion in finding that J.M. would suffer significant emotional trauma if required to testify in appellant's presence.

The Presumption of Innocence

We turn next to appellant's argument under the Fourteenth Amendment. Appellant claims that the admission of the closed circuit television testimony impaired his presumption of innocence. Specifically, appellant argues that "[t]he only reasonable inference that the finder of fact can draw from the [trial] court allowing a witness to testify in this manner, is that the person on trial has abused the witness to such a degree, that to allow the witness to testify in the ordinary manner, would traumatize the witness even further."

The Fourteenth Amendment provides, in relevant part, that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law." The right to due process of law includes within it the right to a fair trial, and basic to a fair trial is the presumption of the defendant's innocence. *Holbrook v. Flynn*, 106 S.Ct. 1340, 1345 (1986); *Estelle v. Williams*, 96 S.Ct. 1691, 1692 (1976); *Homan v. State*, 662 S.W.2d 372, 374 (Tex.Crim.App. 1984) .

> To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.
>
> The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny. Courts must do the best they can to evaluate the likely effects of a particular practice, based on reason, principle, and common human experience.

Estelle v. Williams, 96 S.Ct. at 1693 (citations omitted).

If a particular practice tends to brand the defendant with an unmistakable mark of guilt, it impairs the presumption of innocence and violates the Fourteenth Amendment's guarantee of due process of law, unless it furthers an essential state interest. *Holbrook v. Flynn*, 106 S.Ct. at 1347.

If, on the other hand, the challenged practice need not be interpreted by jurors as a sign that the defendant is particularly dangerous or culpable, it is not inherently prejudicial and does not deny due process.

Based on "reason, principle, and common human experience," we discern no due process violation in the District Court's admission of the closed circuit testimony of B.J. and J.M. Before B.J. and J.M. testified, the District Court carefully instructed the jury that the closed circuit television procedure about to be employed was authorized by statute "in these types of cases." As the Court of Appeals noted, that instruction likely conveyed to the jury the state's general desire to protect children from the intimidating courtroom environment rather than implying that the procedure was necessary because of the defendant's guilt. See *Marx v. State*, 953 S.W.2d at 332. Even in the absence of such an instruction, the use of a closed circuit television procedure "would probably be viewed by the jury as suggesting that the witness was fearful of testifying in the courtroom setting rather than fearful of testifying while looking at the defendant." W. LaFave & J. Israel, *Criminal Procedure* § 24.3 at 1015 (2nd ed. 1992). Thus, we do not think it likely that the use of the closed circuit television procedure had a subconscious effect on the jury's attitude toward appellant. In other words, we do not believe that the challenged practice tended to brand appellant with an unmistakable mark of guilt.

Article 38.071

We turn finally to appellant's argument under Article 38.071.[3] As we noted before, appellant

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[3] See footnote one, *supra*.

argues that the admission of the closed circuit television testimony of B.J. and J.M. violated Article 38.071 because that statute authorizes special testimonial procedures only for victims who are twelve years of age or younger. B.J. was thirteen years old at the time of the offense and at the time of trial, and J.M., although only six years old, was not the victim of the offense for which appellant was on trial.

Article 38.071, § 1, provides, in relevant part:

> This article applies only to a proceeding in the prosecution of [certain specified sex and assaultive offenses, including aggravated sexual assault of a child] if the offense is alleged to have been committed against a child 12 years of age or younger and if the trial court finds that the child is unavailable to testify at the trial of the offense, and applies only to the statements or testimony of that child.

We must determine whether that statutory language prohibits the use of closed circuit television testimony in circumstances not enumerated in the statute.

When we interpret statutes, we necessarily focus our attention on the literal text of the statute in question. *Boykin v. State*, 818 S.W.2d 782, 785 (Tex.Crim.App. 1991). If the meaning of the statutory text, when read using the established canons of construction relating to such text, should have been plain to the legislators who voted on it, we give effect to that plain meaning, unless doing so would lead to absurd consequences that the legislators could not *possibly* have intended. *Ibid.*

Section one of Article 38.071 states that the article applies "only" to the statements or testimony of a witness if certain circumstances, specified in section one, exist. That is, the article, read literally, does not apply to the testimony of a witness in circumstances not specified in section one, nor does the article, read literally, prohibit the use of special testimonial procedures in circumstances not specified in section one. Would it, then, lead to absurd consequences that the legislators could not possibly have intended if we were to give effect to the plain meaning of the

statute? We do not believe so. That this statute does not cover all the circumstances that it might have covered cannot reasonably be deemed an absurd result that the legislators could not possibly have intended. Indeed, it is quite possible that the intent of the legislators who voted for Article 38.071 was simply to enact a narrow statute that would both facilitate the prosecution of certain serious child abuse cases *and* survive an inevitable Confrontation Clause challenge. We also think it likely that those legislators would have made their intent clear if they actually intended to prohibit, except under the enumerated circumstances, special testimonial procedures that, like the one used in this case, *are constitutional*. In short, we agree with the concurring opinion of Judge Benavides, joined by Judges Campbell and Overstreet, in *Gonzales v. State*, 818 S.W.2d 756:

> If the legislature had elsewhere clearly expressed a policy that no courtroom testimony should be allowed except in the physical presence of the defendant, I might be inclined to think that Article 38.071 was meant as a list of specific exceptions to that general rule. But, in this instance, the general rule is expressed only in the Constitution, and the legislature has no authority to make exceptions. It follows that Article 38.071 cannot seriously be taken as an attempt by the legislature to prohibit the use of closed-circuit television [testimony] except under the enumerated circumstances. If that were the case, one might have expected it to say so explicitly, rather than to list exceptions against an unarticulated policy. And, although Article 38.071 might actually have been intended to limit the Constitution, it clearly cannot be effective to such end. Consequently, the only permissible interpretation of the statute, no matter how counterintuitive, is that it prescribes a specific alternative testimonial procedure under certain defined circumstances, leaving the courts free to develop different procedures under other circumstances, constrained only by constitutional prohibitions.

Id. at 768. We hold, therefore, that Article 38.071 did not prohibit the admission of the closed circuit television testimony of B.J. and J.M.

We affirm the judgment of the Court of Appeals.

DELIVERED FEBRUARY 3, 1999

PUBLISH

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 0994-97

JEFFREY STEVEN MARX, APPELLANT

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE THIRD COURT OF APPEALS BURNET COUNTY

HOLLAND, J., filed a concurring and dissenting opinion in which WOMACK and JOHNSON, J.J., joined.

I agree with the majority that Article 38.071 of the Code of Criminal Procedure is not the exclusive authority permitting the use of closed-circuit television for the testimony of a child in Texas. See Gonzales v. State, 818 S.W.2d 756, 764 (Tex. Crim. App. 1991) (adopting the Supreme Court's analysis in Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 111 L.E.2d 666 (1990) as basis for determining whether a defendant's state constitutional rights to confrontation have been violated by a child-witness closed-circuit testimony). I also agree with the majority that permitting B.J., the thirteen-year-old child victim, to testify via closed-circuit television was permissible under

the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. See Maryland v. Craig, supra. I cannot agree with the majority, however, that the evidence supports the district court's decision to permit J.M., a six-year-old witness, to testify via closed-circuit television. Lively v. State, 968 S.W.2d 363 (Tex. Crim. App. 1998); Hightower v. State, 822 S.W.2d 48 (Tex. Crim. App. 1991);Gonzales v. State, supra. I would hold permitting J.M. to testify via this exceptional procedure violated appellant's rights under the Confrontation Clause of the Sixth Amendment.

Appellant was indicted on three counts of aggravated sexual assault of B.J. Before trial, the State filed a written motion asking that B.J. and J.M. be allowed to testify via two-way closed-circuit television. The State argued in the motions that the two girls, "if forced to testify in the presence and sight of the defendant, would suffer serious emotional and physical distress." The State argued, *inter alia*, that the girls' closed-circuit television testimony was admissible under Maryland v. Craig, 497 U.S. 836 (1990). The District Court held a pretrial hearing on the State's motion. After hearing testimony, the district court found, as a matter of fact, that both B.J and J.M. "would be traumatized by being required to testify in the defendant's presence" and that "the emotional distress . . . would be more than a minimum."

The majority holds the record evidence "reasonably supports" the trial court's decision. In a footnote, the majority concedes that the district court's fact-finding with respect to J.M. is "weakly supported by the record evidence" but refuses to find the trial court "abused its discretion in finding that J.M. would suffer significant emotional trauma if required to testify in appellant's presence" because its decision was not "outside the zone of reasonable disagreement." Marx, slip op. at n.2. According to this Court's recent decision in Guzman, almost total deference must be given to the

trial court's determination because the State's motion for closed-circuit testimony of J.M. concerns mixed questions of law and fact that turn on an evaluation of credibility and demeanor. Guzman v. State, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). Viewing the evidence in the light most favorable to the trial court's ruling, I believe the record evidence indicates that J.M. would not suffer further significant emotional trauma if required to testify in appellant's presence regarding her observations of appellant and B.J. Because the majority fails to give a complete account of the testimony presented at the pre-trial hearing, a recitation of the relevant testimony is necessary.

The State's evidence regarding J.M. was based on the testimony of her mother, Crystal Hayden, and Dr. Anita Calvert. Though the testimony of J.M.'s mother on direct examination by the State established that J.M. had suffered emotional harm due to prior sexual offenses allegedly committed by appellant and was frightened of him, Hayden did not indicate that testifying in open court would cause J.M. additional emotional trauma.

Q. Has she shown you any fear or trauma - -

A. Yes.

Q. - - concerning her testifying?

A. Some.

Q. What has she shown to you?

A. Being scared of him, Jeffrey Marx. But she's ready for it. She said she wanted to come.

Q. Okay. Now, do you feel like if she testifies - - Based on your conversations with her and your knowledge of her, do you feel like if she testifies in open court in the same seat that you're sitting in the presence and in sight of Jeffrey Steven Marx, the defendant in this case, would cause any undue physical or psychological or emotional distress to her?

A. It would be better if she was not in the same presence as him, I think. . .

Q. Would you explain to the Court the symptoms that you have indicated or that you have seen her express about Jeffrey Marx and her testifying in court?

A. She has nightmares. She don't sleep in her bed. . . . She's scared to go to the bathroom and she wets the bed. She's real scared.

Q. Do you feel like this would cause more emotional - -

A. Yes, I do.

Q. - - and psychological trauma if she testifies in the presence of Jeffrey?

A. Yes, I do.

After this line of questioning, Hayden was made aware on cross-examination that J.M.'s testimony would not relate to the incidents between her and appellant, but to the incidents she witnessed between appellant and B.J. Once Hayden realized that J.M. would not be testifying in appellant's presence regarding what he had done to her, Hayden retracted her previous testimony and indicated that J.M. "was ready for that."

Q. Do you understand we're talking about testifying just in the case that she's a witness in, not in the case in which she was allegedly abused in? Do you understand that?

A. Yes.

Q. Okay. And you understand all she's going to be asked to testify to in this proceeding is what she allegedly saw through some window?

A. Okay.

Q. Okay. You understand the difference now?

A. Okay. Well, that does make a difference.

Q. Well, sure. All she's going to be asked to testify to is what she - -

A. Okay. So this isn't her case?

Q. No.

A. Okay.

Q. It's Bebe's case.

A. Okay. Well, that she's okay with. I mean, she's ready for that.

Q. I mean, what she saw hasn't caused her any kind of emotional distress or problems, what she allegedly saw through a window?

A. No. She just - - I mean, she could probably do it.

Hayden further testified, in response to questioning by the trial court, that the emotional trauma J.M. had suffered occurred prior to J.M. knowing that she would be testifying against appellant. She did not testify that J.M. suffered emotional trauma because she feared testifying as a witness in this case.

THE COURT: . . . Prior to her being called as a witness in this case, did she have any of those kind of problems like nightmares, wetting the bed, so forth?

THE WITNESS: Could you rephrase that question, please?

THE COURT: You know that your daughter has been called as a witness?

THE WITNESS: Yes, I do.

THE COURT: Before she was called to be a witness in this case, did she have any of those kind of nightmares?

THE WITNESS: Yes.

THE COURT: What caused those then?

THE WITNESS: I don't know.

THE COURT: So what you're telling me then is she's had nightmares all along, even before this happened?

THE WITNESS: Before we found out it happened because it could have happened

a long time ago.

Dr. Calvert testified that though J.M. had in fact suffered emotional trauma due to the prior incidents with appellant, she did not believe testifying in appellant's presence would result in further damage.

Q. . . . Doctor, do you feel like if she testifies in open court in the presence of Jeffrey Steven Marx, that she will - - the result would cause further serious emotional and physical distress than what she has now?

A. If no one was ugly to her, you know, made her feel really badly about it - - I think Jennifer is more of a talker than most. She will probably come on and do it.

Q. Of course, we can make her do that as you well know, but my concern is what would be the emotional and physical distress that would cause - - that would be resulting from her testifying in open court in the presence of another.

A. In the presence of Jeffrey?

Q. Yes, ma'am.

A. She tells me she wants to. So unless she gets more frightened then I expect, that little girl would probably testify okay.

When questioned by the trial court, Dr. Calvert reiterated her prior opinion that testifying as a witness to the offense charged would not cause J.M. further emotional trauma.

THE COURT: Do you feel like there would be any emotional or physical trauma if she were to be in confrontation with the defendant in the ordinary involvement in the courtroom trial?

THE WITNESS: You mean if she had to go and interact with him or is she just -

THE COURT: If she had to sit there and testify from the witness stand.

THE WITNESS: I can't say for sure, but she says she wants to tell what happened, she's a very strong little girl, strong-willed child like that.

THE COURT: Do you think she would suffer any emotional or physical problems as a result of that confrontation?

THE WITNESS: I couldn't guarantee it, but I think - - occasionally there's a child who wants to tell their story.

THE COURT: Listen to my question.

THE WITNESS: Okay.

THE COURT: Do you think that there would be any emotional or physical problems with her confronting - - testifying from that witness stand and having to confront her uncle?

THE WITNESS: Your Honor, I couldn't say for sure that there would not be. I wouldn't expect it.

On redirect by the State, Dr. Calvert explained not having to testify in appellant's present would be easier on J.M. but did not indicate to do so would traumatize her.

Q. Dr. Calvert, if [J.M.] were to be able to tell her story but not in the physical presence of [the defendant], via closed circuit television, do you feel like there would be less trauma, or you could be more assured of less trauma for her to tell her story in that manner than she would if she had to face in the same courtroom [the defendant]?

A. She would probably tell it better if she didn't have to look at him, of course.

•••

Q. Do you feel like she would suffer - - you said a while ago that you weren't sure. Do you feel like there would be a less chance of her - - or would you be more assured that she would not suffer any serious or emotional or physical distress if she testifies via closed circuit television and not in the presence or the sight of [the defendant]?

A. Obviously there would be less risk if there was going to be any trauma to her, yes.

In viewing the evidence in the light most favorable to the district court's ruling, I cannot agree with the majority that the record evidence "reasonably supports" the district court's determination that the closed-circuit procedure was necessary to protect J.M. from further emotional

trauma. In holding the trial court's decision was not outside the zone of reasonable disagreement, the majority ignores Hayden's subsequent clarification that her daughter would suffer further trauma only if forced to testify in appellant's presence regarding what appellant did to her, not what she observed him do to B.J. This clarification cannot be reasonably separated from Hayden's prior testimony. Also, the majority relies on Dr. Calvert's testimony regarding the extent of emotional trauma J.M. has suffered as a result of appellant's abuse. This evidence, however, does not show that the use of this special procedure was necessary to protect J.M. from further emotional trauma as mandated by the Supreme Court in Maryland v. Craig.

Because I find the trial court's decision to allow J.M. to testify via closed-circuit television was an abuse of discretion, I respectfully dissent. Instead, I would hold the trial court violated appellant's right to confrontation under the Sixth Amendment in permitting J.M. to testify via closed-circuit television.

HOLLAND, J.

Date Delivered: February 3, 1999

Publish

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 0994-97

JEFFREY STEVEN MARX, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE THIRD COURT OF APPEALS BURNET COUNTY

KELLER, J., ***delivered a dissenting opinion.***

DISSENTING OPINION

Appellant sought review of the Court of Appeals holdings affirming the trial court's televising, via closed-circuit equipment, of the testimonies of two girls — B.J., the thirteen-year-old child victim, and J.M., a six-year-old child witness. Appellant alleged that this procedure violated Texas Code of Criminal Procedure, Article 38.071, the Confrontation Clause of the Sixth Amendment, and the Due Process Clause of the Fourteenth

Amendment. The majority affirms, finding that the statute is not the exclusive authorization for the closed-circuit procedure and that there is no violation of the United States Constitution. I agree with the majority's assessment that Article 38.071 does not preclude the procedure employed in the present case but I do so for reasons different from those articulated in the lead opinion. And I agree with the majority that using the closed-circuit procedure was constitutionally permissible for B.J.'s testimony. I disagree with the majority, however, regarding the testimony of J.M. Use of the closed-circuit procedure for her testimony violated the Confrontation Clause.

I. ARTICLE 38.071

Article 38.071 applies only to the testimony of child victims twelve years of age or younger:

> This article applies only to a proceeding in the prosecution of an offense defined by any of the following sections of the Penal Code if the offense is alleged to have been committed against a child 12 years of age or younger....

Article 38.071 §1 (ellipsis inserted). Hence, the statute could not authorize the use of closed-circuit televised proceedings for either B.J. or J.M. because B.J. was older than twelve and J.M. was not the victim.

The question in the present case is whether Article 38.071 constitutes the <u>exclusive</u> procedure for using closed-circuit televised testimony. If it does, then the closed-circuit procedure

for both B.J. and J.M. was improper as a matter of state law because the requirements of the statute were not met. The starting point in any question of statutory construction is the text of the statute itself. When a statute is clear and unambiguous, we apply the plain meaning of its words. Boykin v. State, 818 S.W.2d 782, 785-786 & 786 n. 4 (Tex.Crim.App.1991). We examine extratextual factors only when the words of the statute are ambiguous or the plain meaning would lead to absurd results. Id. In determining plain meaning, "[w]ords and phrases shall be read in context and construed according to the rules of grammar and usage." TEX. GOV'T CODE § 311.011(a); Dowthitt v. State, 931 S.W.2d 244, 258 (Tex.Crim.App. 1996). In addition, we presume that "the entire statute is intended to be effective." TEX. GOV'T CODE § 311.021(2); Dowthitt, 931 S.W.2d at 258. "Every word in a statute has been used for a purpose and each word, phrase, clause, and sentence should be given effect if reasonably possible." Dowthitt, 931 S.W.2d at 258; Morter v. State, 551 S.W.2d 715, 718 (Tex.Crim.App.1977), quoting Eddins-Walcher Butane Co. v. Calvert, 156 Tex. 587, 591, 298 S.W.2d 93, 96 (1957).

Read literally, the statute simply does not apply when the child is older than twelve or not the victim, and therefore, the statute cannot limit the State's ability to procure testimony by such persons. The majority resolves the statutory challenge by holding exactly that: that the statute does not apply to non-victims or to children older than twelve. However, it appears to me that the plain language of the statute would lead to absurd

results. If trial courts have the power to provide a closed-circuit procedure apart from the statute and are not bound by the statute's requirements, then that portion of the statute has no impact in this state; nothing would change if the closed-circuit provision did not exist. Showing, however, that the plain meaning of a statute leads to absurd results does not end the inquiry. Extratextual sources may show that the result is not absurd, after all, or that the Legislature intended the plain meaning despite the absurd result. Hence, an examination of extratextual sources is required.

The Legislature has given some guidance as to the factors we may examine in construing the statute. We may consider, among other matters, the

(1) object sought to be attained;

(2) circumstances under which the statute was enacted;

(3) legislative history;

(4) common law or former statutory provisions, including laws on the same or similar subjects;

(5) consequences of a particular construction;

(6) administrative construction of the statute; and

(7) title (caption), preamble, and emergency provision.

Tex. Gov't.Code, § 311.023; Ramos v. State, 934 S.W.2d 358, 364 (Tex.Crim.App. 1996).[1]

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[1] This provision is part of the "Code Construction Act," which applies to the Code of Criminal Procedure, at least to the extent it has been amended or reenacted by the 60th or subsequent legislature. Tex. Gov't Code § 311.002(2); Ramos, 934 S.W.2d at 364, n. 8; Postell v. State, 693 S.W.2d 462, 464 (Tex.Crim.App.1985); Barbee v. State, 432 S.W.2d 78, 82

The legislative history and the circumstances under which the statute was enacted reveal some clues to its interpretation. Article 38.071 was passed in 1983, long before the advent of the Supreme Court's decision in Maryland v. Craig, 497 U.S. 836 (1990). Hence, the Legislature did not, through the statute, attempt to codify Supreme Court precedent as no such precedent yet existed.[2] The Legislature was, however, concerned about the Confrontation Clause. On the Senate Floor, Senator Parmer, the sponsor of the bill, stated that the proposed law "very narrowly draws the lines and limits for the introduction of such testimony to make sure that we don't offend the constitutional provisions for confrontation and cross-examination." Senate Floor, SB 836, May 17, 1983.[3] This statement could be interpreted as supporting appellant's position, but other legislative statements and circumstances undercut such an interpretation.

The statute was also enacted before the adoption of the Rules

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(Tex.Crim.App.1968), cert. denied, 395 U.S. 924, 89 S.Ct. 1779, 23 L.Ed.2d 241 (1969).

[2] An example in which the Legislature did codify Supreme Court precedent is Texas Code of Criminal Procedure, Article 37.071 §2(e), which codified Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

[3] In 1987, the scope of offenses was narrowed from any offense to a list of specified offenses, and a requirement that the child be "unavailable" was added. A number of substantial revisions in other portions of the statute were also made. In addition, the 1987 law contained a "purpose" statement, with even stronger language concerning the intent to conform to the Confrontation Clause. But, that purpose statement carries little, if any, weight on the issue at hand because the changes in the statute do not appear to be material to the question of whether the statute is the exclusive method through which closed-circuit procedures may be conducted. "[O]ne session of the legislature does not have the power to declare the intent of a past session, and a legislative construction of an act of another legislature is uniformly held to be entitled to little weight." Ex parte Schroeter, 958 S.W.2d 811, 813 (Tex.Crim.App. 1997).

of Criminal Evidence, which were adopted in 1985 and made effective in 1986. During public hearings at the Senate Committee on Jurisprudence, Steve Chaney, then chief of the trial section at the Tarrant County District Attorney's Office, testified that the proposed bill would render admissible at trial videotape evidence that grand juries were already permitted to see. Transcript, Senate Committee on Jurisprudence, SB 836, April 19, 1983, p. 6. He stated that the evidence was not admissible at trial because it was hearsay. Transcript, p. 8. On the Senate Floor, before final passage, Senator Parmer echoed that the testimony was, at the time, "available to the grand jury but not available to the trial jury." Senate Floor, SB 836, May 17, 1983. The bill, and later the statute as enacted, contained provisions regarding the admissibility of prerecorded videotaped testimony as well as provisions for televised live testimony via closed circuit equipment. Senator Parmer referred to both types of testimony as "videotaped" testimony and made no other attempt to distinguish the two. Senate Floor, SB 836, May 17, 1983. At the time Article 38.071 was originally enacted, hearsay was a common-law rule, the precise contours of which were uncertain. See 24 Tex. Jur.2d Evidence §§557 and 561.

What can be divined from the circumstances and legislative history is that the Legislature was apparently attempting to create hearsay exceptions that would pass muster under the Confrontation Clause without any real guidance concerning the scope of the hearsay rule or of the Confrontation Clause. The Legislature may

have believed that the hearsay rule would bar live closed-circuit testimony as well as prerecorded videotaped testimony. Such a belief would have been erroneous because live closed-circuit testimony is not "out of court" testimony, but such a belief would explain the inclusion of the closed-circuit provision in the statute. Or, the Legislature may have originally drafted the statute to create a hearsay exception just for videotaped testimony, later adding on the closed-circuit testimony provision without contemplating the difference in nature of the two types of testimony.

What is clear from the legislative history, and what is to me dispositive of this aspect of the problem, is that the Legislature intended to expand (rather than restrict) the admissibility of evidence in passing Article 38.071. Therefore, if the courts otherwise have the power to authorize closed-circuit procedures, the Legislature did not intend, in passing Article 38.071, to limit that power.

The question then becomes, do courts have the power, apart from statute, to authorize the use of televised, closed-circuit procedures. The answer is yes. We have recognized that the courts have inherent power over "the everyday administration of justice." Matchett v. State, 941 S.W.2d 922, 932 (Tex. Crim. App. 1996), cert. denied, ____ U.S. _____, 117 S. Ct. 2487. Moreover, the Legislature has directed that the courts "control proceedings so that justice is done." Tex. Gov't Code §21.001(b). Hence, absent a constitutional provision, statute, or rule to the contrary, the

trial court has the power to control the procedural aspects of a case. One of those procedural aspects is the manner in which witnesses will be required to testify. Therefore Article 38.071 does not bar the procedures employed in the present case.

II. CONFRONTATION

The Sixth Amendment provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." This right to confrontation was made applicable to the states by the Due Process Clause of the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400 (1965). "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before a trier of fact." Craig, 497 U.S. at 845. The Confrontation Clause reflects a preference for face-to-face confrontation at trial, but that preference must occasionally give way to considerations of public policy and the necessities of the case. Id. at 849. In Craig, the Supreme Court recognized that the state had an interest in protecting the psychological well-being of child abuse victims which interest may, in the proper case, justify denying face-to-face confrontation. Id. at 853.

The Confrontation Clause issue presented by this case has two parts: (1) what level of emotional harm must the State show that a child will suffer in order to justify depriving a defendant of his right to a face-to-face confrontation, and (2) is there sufficient

evidence in the record to support a conclusion that the child would suffer the requisite level of emotional harm?

A. Degree of emotional harm required

The level of emotional harm required to justify dispensing with face-to-face confrontation is a question of law. I so conclude because the trial court "is not in an appreciably better position to decide the issue," Guzman v. State, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)(quoting Villarreal v. State, 935 S.W.2d 134, 139 (McCormick, P.J. concurring)), and because this is an issue where uniformity of application is important, see Villarreal, 935 S.W.2d at 148 (Keller, J. concurring). Moreover, the Supreme Court cast the issue as one of law by indicating that it had the authority to decide the level of emotional trauma required to justify avoiding a face-to-face confrontation. Craig, 497 U.S. at 856.

The Supreme Court did "not decide the minimum showing of emotional trauma" for using a televised, closed-circuit procedure. Id. The Court simply held that "mere nervousness or some reluctance to testify" (a mere *de minimis* showing) fell below the minimum showing and that "serious emotional distress such that the child cannot reasonably communicate" clearly met constitutional requirements. Id.; *see also* Gonzales v. State, 818 S.W.2d 756, 762 n. 10 (Tex. Crim. App. 1991)(acknowledging that the Supreme Court "was not willing to decide what would suffice to meet this `more than *de minimis* standard'"). The question left open is, how much

harm must be shown? Is the minimum threshold of emotional distress one that just barely exceeds "mere nervousness or reluctance to testify?" Or is something more required? I believe more is required. "That the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with." Id. at 850. Therefore, I would hold that, to pass muster under the Confrontation Clause, the State must show that the child witness would suffer more trauma than a victim of a serious, violent crime would ordinarily feel when facing the perpetrator in court.[4] Any other standard would permit the State to avoid the requirements of the Confrontation Clause as a matter of course. While child victims more often need special protection, denying

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[4] The majority claims that this holding would overrule Lively v. State, 968 S.W.2d 363 (Tex. Crim. App. 1998), Hightower v. State, 822 S.W.2d 48 (Tex. Crim. App. 1991), and Gonzales (cited above). Lively and Hightower rely upon Gonzales for interpreting the Supreme Court's decision in Craig. Lively, 968 S.W.2d at 366; Hightower, 822 S.W.2d at 51. In Gonzales, we set up a three part test based upon Craig. 818 S.W.2d at 762. The third prong of that test is that the emotional distress suffered must be "more than *de minimis*, i.e., more than mere nervousness or excitement or some reluctance to testify." Id. (quoting Craig). In formulating that third prong, we relied strictly upon the Supreme Court's opinion and made no attempt to interpret the standard that Court set with more precision. *See* Id. As discussed above, we acknowledged that the Supreme Court did not determine precisely what would suffice to meet a "more than *de minimis*" standard. Id. at 762 n. 10. That is the question we confront today in the present case. None of the three cases cited by the majority had occasion to explore the precise contours of the threshold showing of harm. Gonzales and Hightower involved children who could not reasonably communicate without the closed circuit procedure. Gonzales, 818 S.W.2d at 764 (the child "would be incapable of testifying in front of" the defendant); Hightower, 822 S.W.2d at 52 ("The child witness would have suffered such serious additional emotional distress that the child would not have been able to reasonably communicate"). In Lively, there was evidence that the child "regressed" and "withdrew" "back into himself" in the defendant's presence and that testifying in the courtroom would cause the child to "regress in his therapy." 968 S.W.2d at 367. In all three cases, the State made a showing sufficient to satisfy the standard I propose today: there was evidence in all three cases that the children would suffer more harm than that ordinarily suffered by a victim of a serious, violent crime facing the perpetrator in court.

face-to-face confrontation should still be the exception rather than the rule.[5]

B. Degree of emotional harm shown

Next, I turn to the second inquiry: is there sufficient evidence to show the requisite degree of harm? This issue is obviously a fact question that requires "almost total deference" to the trial court's findings. See Guzman, 935 S.W.2d at 89. Giving almost total deference means viewing the evidence in the record "in the light most favorable to the trial court's ruling." Id. I now examine the record to determine whether the evidence was sufficient to justify avoiding face-to-face confrontation of B.J. and J.M.

1. B.J.'s testimony

Employing closed-circuit procedures for B.J. does not violate the Confrontation Clause. The record shows that B.J. had learning disabilities and read at a six-year-old's level. The record also shows that B.J. was very fearful of testifying before appellant, and that such testimony would be traumatic for her. In fact, a teacher testified that "when it's mentioned she [B.J.] may have to face him [appellant] face to face, she keeps saying `I can't'"

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[5] Justice Scalia, joined by Justice Thomas, has recently cautioned that the *Craig* exception to face-to-face confrontation "is a narrow one":

> It is a dangerous business to water down the confrontation right so dramatically merely because society finds the charged crime particularly reprehensible. Indeed, the more reprehensible the charge, the more the defendant is in need of all constitutionally guaranteed protection for his defense.

Danner v. Kentucky, _ U.S. __, 1998 W.L. 348372, *2 (November 16, 1998)(Scalia, J. dissenting from refusal to grant certiorari).

(bracketed material inserted). The testimony showed that B.J. cried about the possibility of facing appellant, and there was even evidence that B.J. might suffer physically if she testified. Given evidence of B.J.'s low intellectual functioning for her age, the high level of fear she showed about facing appellant, and other testimony about the harm she would suffer, I agree with the Court of Appeals' holding that the trial court was within its discretion in conducting the special procedure for her testimony. The record supports a finding that testifying would cause B.J. to suffer more trauma than would ordinarily be suffered by the victim of a serious, violent crime when facing the perpetrator in court.

2. J.M.'s testimony

But J.M.'s testimony is another matter entirely. The State's evidence concerning J.M. falls primarily in four categories: (1) emotional harm J.M. has suffered as a result of the crime, (2) J.M.'s fear of appellant, (3) the harm J.M. would suffer if she testified, and (4) evidence that it would be better if J.M. testified via the closed-circuit method.

J.M.'s mother testified that J.M. had nightmares and could not sleep in her bed. Further, the mother testified that J.M was scared to go to the bathroom and she wet her bed. Although the State attempted, through its questioning, to link these effects to the upcoming testimony, the witness never provided such a link. In fact, questioning from the trial court established that these symptoms occurred even before the crime was discovered and well prior to the time that J.M. was informed that she would be

testifying. Dr. Anita Calvert also testified that J.M. suffered serious emotional damage as a result of the crime. She further testified that J.M. was "a wreck," that she had problems with trusting people, and that she engaged in sexually inappropriate behavior. Dr. Calvert never testified, however, that any of these symptoms were linked to J.M.'s anticipated testifying; rather, Dr. Calvert testified specifically that the symptoms were attributable to the assaults committed against J.M.

J.M.'s mother also testified that J.M. was scared of appellant but wanted to testify in court:

> Q. What has she shown to you?
>
> A. Being scared of him, Jeffrey Marx. But she's ready for it. She said she wanted to come.
>
> ....
>
> Q. And not telling me what she said, but based upon what she has said to you, does she show any sign of being afraid when she talks about what she saw?
>
> A. Some.

Both J.M.'s mother and Dr. Calvert were questioned concerning the emotional harm that would be caused by testifying in appellant's presence. J.M.'s mother affirmed that J.M. would suffer "some harm" if she testified in appellant's presence because "she's scared of him." The mother further assented that testifying in appellant's presence "would cause more emotional and psychological trauma." During cross-examination, however, J.M.'s mother indicated that testifying as a mere witness, instead of as a victim, would pose much less of problem:

> Q. And you understand all she's going to be asked to

testify to in this proceeding is what she allegedly saw through some window?

A. Okay.

Q. Okay. You understand the difference now?

A. Okay. Well, that does make a difference.

Q. Well, sure. All she's going to be asked to testify to is what she —

A. Okay. So this isn't her case?

Q. No.

A. Okay.

Q. It's [B.J.'s] case.

A. Okay. Well, that she's okay with. I mean, she's ready for that.

Q. I mean what she saw hasn't caused her any kind of emotional distress or problems what she allegedly saw through a window?

A. No. She just — I mean, she could probably do it.

On redirect, J.M.'s mother stated that J.M.'s testifying in appellant's presence would "probably" traumatize her because "[s]he hasn't seen the man in almost a year."

Dr. Calvert stated that J.M. could testify in appellant's presence with little difficulty:

Q. Doctor, do you feel like if she testifies in open court in the presence of Jeffrey Steven Marx, that she will — the result would cause further serious emotional and physical distress than what she has now.

A. If no one was ugly to her, you know, made her feel really badly about it — I think [J.M.] is more of a talker than most. She will probably come on and do it.

Q. Of course, we can make her do that as you well know, but my concern is what would be the emotional and physical distress that would cause — that would be

resulting from her testifying in open court in the presence of another.

A. In the presence of Jeffrey?

Q. Yes, ma'am.

A. She tells me she wants to. So unless she gets more frightened than I expect, that little girl would probably testify okay.

Dr. Calvert maintained this position in the face of questioning by the trial court:

Q. Do you feel like there would be any emotional or physical trauma if she were to be in confrontation with the defendant in the ordinary involvement in the courtroom trial?

A. You mean if she had to go and interact with him or if she just —

Q. If she had to sit there and testify from the witness stand.

A. I can't say for sure, but she says she wants to tell what happened, and she's a very strong little girl, strong-willed child like that.

Q. Do you think she would suffer any emotional or physical problems as a result of that confrontation?

A. I couldn't guarantee it, but I think — occasionally there's a child who wants to tell their story.

Q. Listen to my question.

A. Okay.

Q. Do you think that there would be any emotional or physical problems with her confronting — testifying from that witness stand and having to confront [appellant]?

A. Your Honor. I couldn't say for sure that there would not be. I wouldn't expect it.

Finally, there was testimony from J.M.'s mother and Dr. Calvert that it would be "better" if J.M. did not testify in

appellant's presence. J.M.'s mother testified in the following exchange:

> Q. Now, do you feel like if she testifies — Based on your conversations with her and your knowledge of her, do you feel like if she testifies in open court in the same seat that you're sitting, in the presence and in the sight of Jeffrey Steven Marx, the defendant in this case, would cause any undue physical or psychological or emotional distress to her?
>
> A. It would be better if she was not in the same presence as him, I think.

Dr. Calvert also opined that it might be "better" if J.M. testified outside appellant's presence:

> Q: Dr. Calvert, if [J.M.] were able to tell her story but not in the physical presence of Jeffrey Steven Marx, via closed-circuit television, do you feel like there would be less trauma, or you could be more assured of less trauma for her to tell her story in that manner than she would if she had to face in the same courtroom Jeffrey Marx?
>
> A. She would probably tell it better if she didn't have to look at him, of course.
> ....
>
> Q. Do you feel like she would suffer — you said a while ago that you weren't sure. Do you feel like there would be a less chance of her — or would you be more assured that she would not suffer any serious or emotional or physical distress if she testifies via closed circuit television and not in the presence or the sight of Jeffrey Marx?
>
> A. Obviously there would be less risk if there was going to be any trauma to her, yes.

Having viewed the four categories of evidence presented by the State, I conclude, even in the light most favorable to the trial court's ruling, that the evidence is insufficient to support a finding of the requisite degree of harm that would justify abrogating the accused's right to face-to-face confrontation.

Category (1), the harm caused by the crime, is only tangentially related to the inquiry at hand. That a victim may have suffered serious emotional harm as a result of the crime does not prove that the victim will suffer additional serious emotional harm - greater than that ordinarily suffered by a victim of a serious, violent crime - from testifying in the perpetrator's presence. At most, it might provide a background in which to assess other evidence directly relevant to the issue. If evidence of emotional trauma resulting from the offense were sufficient to authorize closed-circuit testimony, such would be routinely justified.

Category (4), testimony that it would be "better" for the victim if she testified via closed-circuit television, provides little, if any support for a showing of the requisite degree of harm. That the victim might be "better off" emotionally or could better relate her story does not show that by testifying face-to-face she would suffer an emotional harm greater than that ordinarily suffered by a victim of a serious, violent crime testifying face-to-face. As Dr. Calvert testified, obviously, there would be less risk of trauma from closed-circuit testimony. But, again, if we were to hold that that fact authorized closed-circuit testimony, the procedure would be authorized in virtually every case.

That leaves categories (2) and (3), the victim's fear of the accused and evidence that testifying in the accused's presence would cause emotional harm. Category (2) is circumstantial evidence to support emotional harm from testifying while category

(3) is direct evidence. None of the evidence fitting these two categories in the present case rises to the requisite degree of harm. At most, the State proved through the mother's testimony that J.M. would probably suffer some psychological harm if she testified in appellant's presence. But, the significance of J.M.'s mother's testimony was seriously undercut after she realized that J.M. would not be testifying on her own case. Moreover, the record is replete with undisputed evidence, from both J.M.'s mother and from Dr. Calvert, that J.M. wanted to testify and was ready to testify in appellant's presence. And, Dr. Calvert clearly and consistently testified that serious emotional harm from face-to-face testimony was unlikely.

Under these circumstances, even considering together all of the evidence in the light most favorable to the trial court's ruling, the record does not support a conclusion that J.M. would suffer more trauma than a victim of a serious, violent crime would ordinarily feel when facing the perpetrator in court. Hence, I would find that the trial court violated appellant's right of confrontation under the Sixth Amendment when it permitted J.M. to testify via closed-circuit television.

I would reverse the decision of the Court of Appeals and remand the cause to that court to conduct a harm analysis.

KELLER, J.

DELIVERED: February 3, 1999
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findings "are against the great weight and preponderance of the evidence." The "insufficient evidence" challenge is appropriate when the party without the burden of proof on an issue complains of fact findings. *Neily v. Aaron*, 724 S.W.2d 908 (Tex.App.—Fort Worth 1987, no writ). Lozano's complaints fall within the first category.

[29–31] The standard of review for factual insufficiency is set forth in *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951). In reviewing a point of error asserting that a finding is against the great weight and preponderance of the evidence, we must consider all of the evidence, both the evidence which tends to prove the existence of a vital fact as well as evidence which tends to disprove its existence. We cannot substitute our own conclusions for those of the jury, nor may we interfere with the jury's resolution of evidentiary conflicts, or to pass on the weight or credibility of the witnesses' testimony. *Benoit v. Wilson*, 150 Tex. 273, 239 S.W.2d 792, 796 (Tex.1951); *Southwest Airlines Co. v. Jaeger*, 867 S.W.2d 824, 829–30 (Tex. App.—El Paso 1993, writ denied). Where there is conflicting evidence, the jury's verdict on such matters is generally regarded as conclusive. *Montgomery Ward & Co. v. Scharrenbeck*, 146 Tex. 153, 204 S.W.2d 508 (1947); *Tseo v. Midland American Bank*, 893 S.W.2d 23, 26 (Tex.App.—El Paso 1994, writ denied); *Hallmark v. Hand*, 885 S.W.2d 471, 474 (Tex.App.—El Paso 1994, writ denied). If there is sufficient competent evidence of probative force to support the finding, it must be sustained. *Tseo*, 893 S.W.2d at 26; *Texas Tech University Health Sciences Center v. Apodaca*, 876 S.W.2d 402, 412 (Tex.App.—El Paso 1994, writ denied).

We have meticulously detailed the evidence presented to the jury. We pause here to note that the jury heard testimony concerning Lozano's own negligence in calling to Rios to start the agitator and/or auger while Lozano was still inside the bind. The jury heard conflicting testimony concerning the safety of the patcher as currently designed, including testimony that the operating manual, the orientation provided by the Company, and signs on the machine itself all warned against climbing into the bind while the power was turned on. Further, with respect to the design defect claim, there was conflicting evidence concerning the efficacy and workability of the proposed safety mechanisms described by Lozano's expert. Inasmuch as there was extensive, albeit conflicting, testimony on all issues related to design defect and adequacy of warnings, we cannot conclude that the verdict is against the great weight and preponderance of the evidence.

We overrule Points of Error Nos. One through Five and affirm the judgment.

Jeffrey Steven MARX, Appellant,

v.

The STATE of Texas, Appellee.

No. 03–95–00333–CR.

Court of Appeals of Texas,
Austin.

July 3, 1997.

Defendant was convicted in the District Court of Burnet County, 33rd Judicial District, Charles J. Hearn, J., of aggravated sexual assault of a child. Defendant appealed. The Court of Appeals, Bea Ann Smith, J., held that: (1) as a matter of first impression, testimony by closed-circuit television does not violate criminal defendant's right to due process when trial court finds that procedure is necessary for individual child witness' well-being; (2) in such cases, trial court should instruct jury that televised testimony should not be taken as comment on defendant's guilt; but (3) court's instruction that state statutes authorized testimony by closed-circuit television was sufficient; (4) use of closed-circuit televised testimony did not violate defendant's right to be presumed innocent; (5) confession that was typed and read to defendant, based on defendant's claim that he could not read or write, was

admissible where defendant signed it and voluntary statement form and officer testified that he gave defendant required warnings; and (6) allowing witnesses to testify was not abuse of discretion even though they were not on state's witness list and may have been present in courtroom during trial.

Affirmed.

Kidd, J., concurred and filed a separate opinion.

1. Witnesses ⇐228

Statute allowing testimony to be given by closed-circuit television in aggravated sexual assault cases is not the only basis for permitting closed-circuit testimony by a child victim, and state has sufficiently important interest in protecting child victims from traumatic effects of testifying to justify use of closed-circuit televised testimony under certain circumstances. Vernon's Ann.Texas C.C.P. art. 38.071, § 1.

2. Witnesses ⇐228

To justify use of closed-circuit televised testimony for child victim or witness, trial court must determine, by hearing evidence, that procedure is necessary to protect welfare of particular child witness who seeks to testify, that child witness would be traumatized by presence of defendant, and that emotional distress that child witness would suffer in defendant's presence is not de minimis.

3. Witnesses ⇐228

Trial court's finding of necessity to justify use of closed-circuit televised testimony for child victim or child witness supplants statutory requirement of unavailability. Vernon's Ann.Texas C.C.P. art. 38.071, § 1.

4. Criminal Law ⇐1153(4)

Court of Appeals reviews trial court's determination of necessity to use closed-circuit televised testimony for child witness for abuse of discretion; while review typically involves reviewing trial court's findings of fact, in absence of recorded findings of fact the Court of Appeals can review the record to determine whether it supports trial court's ultimate determination, where defendant did not request, and did not challenge absence of, fact findings.

5. Witnesses ⇐228

Permitting closed-circuit televised testimony of child sexual abuse victim was supported by evidence that she was very frightened of facing defendant in court, that testifying in his presence would cause her to suffer psychological and perhaps even physical harm, and that 14–year–old victim had emotional maturity of a six or seven year old. Vernon's Ann.Texas C.C.P. art. 38.071, § 1.

6. Witnesses ⇐228

Permitting closed-circuit televised testimony of six-year-old eyewitness in sexual abuse case was supported by evidence that witness would suffer from testifying in defendant's presence and that witness had allegedly been sexually assaulted by defendant, especially where court found it necessary to allow 14–year–old child victim to testify, as allowing victim but not witness to give closed-circuit testimony could have endangered defendant's presumption of innocence by emphasizing that victim alone needed special protection from defendant. Vernon's Ann.Texas C.C.P. art. 38.071, § 1.

7. Witnesses ⇐228

Trauma to child victim of confronting a perpetrator in courtroom is not necessarily diminished because subject of her testimony is defendant's assault on another victim, and trauma can support finding of necessity to use closed-circuit televised testimony. Vernon's Ann.Texas C.C.P. art. 38.071, § 1.

8. Witnesses ⇐228

In order to warrant closed-circuit televised testimony in sexual abuse case, emotional distress to child victim or witness must be caused by defendant's presence and not the courtroom generally, and trauma must be more than mere nervousness or excitement or some reluctance to testify. Vernon's Ann.Texas C.C.P. art. 38.071, § 1.

9. Criminal Law ⇐1166.6

To constitute reversible error based on deprivation of fair trial, defendant must show that some courtroom procedure entailed ei-

ther actual prejudice or inherent prejudice, that is, such a probability that prejudice will result that it is deemed inherently lacking in due process. U.S.C.A. Const.Amends. 5, 6, 14.

10. Criminal Law ⇐633(1)

Specific challenges to courtroom procedure based on right to be presumed innocent require a finding that challenged practice creates an unacceptable risk of impermissible factors tending to erode the presumption of innocence.

11. Criminal Law ⇐633(1)

Even if a courtroom procedure is found to be inherently prejudicial to defendant's right to be presumed innocent, procedure may be justified if it furthers an essential state interest.

12. Criminal Law ⇐308

Defendant's right to be presumed innocent is not absolute.

13. Constitutional Law ⇐268(10)
Witnesses ⇐228

Practice of using closed-circuit televised testimony of child witness when trial court finds it is necessary for individual witness' well-being does not violate defendant's due process rights or constitutional guarantee to be presumed innocent. U.S.C.A. Const. Amends. 5, 14; Vernon's Ann.Texas C.C.P. art. 38.071, § 1.

14. Witnesses ⇐228

In determining whether used of closed-circuit televised testimony is necessary for individual witness' well-being, trial courts should exercise caution and reason in balancing defendant's important constitutional rights against the equally important state interest of protecting child victims from further victimization in the courtroom. U.S.C.A. Const.Amends. 5, 14; Vernon's Ann.Texas C.C.P. art. 38.071, § 1.

15. Criminal Law ⇐778(3)

Use of closed-circuit televised testimony of child witness warrants additional jury instruction to minimize potential prejudice to defendant, and additional instruction impressing on jury defendant's presumed innocence will strike adequate balance between preserving defendant's presumption of innocence and fostering state's interest in protecting child victims. Vernon's Ann.Texas C.C.P. art. 38.071, § 1.

16. Criminal Law ⇐777, 778(4)

Instructions given jury concerning use of closed-circuit televised testimony for child victim and child witness were adequate, even though additional instruction on defendant's presumed innocence may have been desirable, where prior to beginning of televised testimony court explained that statutes allow procedure in "these types of cases," defendant did not request special instruction, statute did not apprise court of duty to give one, and court generally instructed jury in charge at end of trial to presume defendant's innocence before considering evidence against him. Vernon's Ann.Texas C.C.P. art. 38.071, § 1.

17. Criminal Law ⇐1158(3)

In reviewing trial court's rulings at *Batson* hearing, Court of Appeals determines whether trial judge's decision was supported by the record so that it is not clearly erroneous, and should defer to trial court's decision unless it is left with definite and firm conviction that mistake has been committed; standard of review is applied considering record, including voir dire and racial makeup of venire, prosecutor's neutral explanations, and defendant's rebuttal and impeaching evidence.

18. Jury ⇐33(5.15)

Fact that prosecutor gave different racially neutral reason for striking juror at *Batson* hearing than he gave at original proceeding two years earlier did not show that reasons were pretext for racial discrimination.

19. Criminal Law ⇐1035(6)

Defendant properly preserved alleged error in denying his challenges for cause against six venirepersons, where defense counsel exercised six peremptory challenges to exclude those jurors, exhausted all of his peremptory challenges, and unsuccessfully requested six additional peremptory challenges.

20. Jury ⇐97(1)

To prevail on challenge of venireperson for cause, defendant must demonstrate either a bias against himself or against a rule of law upon which he is entitled to rely.

21. Criminal Law ⇐1134(5)
Jury ⇐97(1)

Trial court's determination, and Court of Appeals review of that determination, of whether views of potential jurors that defendant challenged for cause would prevent or substantially impair their duties to act in accordance with instructions and jurors' oaths should be based on the voir dire examination of the prospective jurors taken as a whole.

22. Jury ⇐97(1)

Prospective juror who initially equivocates in her answers on voir dire is not challengeable for cause if she ultimately states that she can follow trial court's instruction and render a verdict based on the evidence.

23. Criminal Law ⇐1153(1)

Court of Appeals reviews trial court's rulings at suppression hearing for abuse of discretion.

24. Criminal Law ⇐394.6(5)

Trial court,at suppression hearing, is the sole trier of fact and judge of credibility of witnesses and weight to be given their testimony, and may accept or reject any or all of a witness' testimony or evidence offered.

25. Criminal Law ⇐1158(4)

In reviewing trial court's decision at suppression hearing, an appellate court does not engage in its own factual review, but determines only whether record supports trial court's finding.

26. Criminal Law ⇐412.2(3)

Statutory requirement that mandatory warnings be reflected on the face of any statement used against an accused in criminal proceeding was met where officer testified that he read statement, that was typed on computer due to defendant's claim that he could not read or write, to defendant, that defendant signed each page, and that he gave defendant required warnings orally before defendant gave the statement and defendant said he understood them. Vernon's Ann.Texas C.C.P. art. 38.22, § 2.

27. Criminal Law ⇐211(1)

Affidavit supporting issuance of arrest warrant must contain more than merely conclusory statements by police officer, and must contain sufficient facts supporting officer's personal knowledge or belief of alleged facts such that a neutral and detached magistrate may determine whether probable cause exists.

28. Criminal Law ⇐394.1(3)

Written statement that is product of an illegal arrest is inadmissible as evidence against the accused.

29. Criminal Law ⇐211(1)

Affidavits provided by officer provided magistrate with enough information to determine that probable cause existed to issue arrest warrant for defendant, even though affidavits used fragmented statements to communicate officer's knowledge, where affidavits stated more than conclusions; affidavits alleged that officer viewed sexual assault victim's video-recorded statement, had personally heard outcry from victim, and had taken corroborating statement from alleged eyewitness.

30. Criminal Law ⇐517(5)

Statements that were part of sexual assault defendant's redacted confession, that "I ejaculated every time I did something," and "I knew these girls were children when I did it," were admissible as probative of defendant's motive of sexual gratification and knowledge that victim was a child, and were not impermissible character evidence. Rules of Crim.Evid., Rule 404(b).

31. Criminal Law ⇐369.2(1)

Evidence of extraneous acts is admissible if it has relevance beyond its tendency to prove character and if its probative value substantially outweighs the danger of unfair prejudice. Rules of Crim.Evid., Rule 404(b).

32. Criminal Law ⇐369.1, 1153(1)

The admission of extraneous offense evidence lies within the sound discretion of the trial court and will be reversed only for an abuse of that discretion. Rules of Crim. Evid., Rule 404(b).

33. Criminal Law ⇐1137(6)

Child sexual abuse defendant was not entitled to raise issue of exclusion of evidence of victim's previous sexual conduct on appeal where defendant failed to meet procedural requirement for its admissibility; defendant did not inform court beforehand of his intention to inquire into alleged incident concerning sexual assault by victim's uncle, and instead, attempted to ask victim about incident on cross-examination. Rules of Crim.Evid., Rule 412.

34. Rape ⇐40(5)

Exclusion of evidence that child sexual abuse victim had been sexually assaulted by someone else at some time before charged conduct was not abuse of discretion, despite defendant's claim that it was necessary to rebut or explain state's medical evidence, where state introduced doctor's testimony to show that victim had been sexually assaulted and doctor testified that she could not tell when victim had been penetrated; thus, medical testimony did not tend to corroborate victim's identification of defendant as the assailant and rebuttal of medical evidence was not necessary. Rules of Crim.Evid., Rule 412(b)(3).

35. Criminal Law ⇐1148

Court of Appeals reviews trial court's decision to allow testimony by witnesses who were not on state's witness list for abuse of discretion.

36. Criminal Law ⇐1148

In determining whether trial court abused its discretion in allowing witnesses, who were not on state's witness list, to testify, Court of Appeals considers whether prosecutor engaged in bad faith by not disclosing witness names and whether defendant could reasonably anticipate that witness would testify although name was not on list.

37. Criminal Law ⇐629.5(5)

Trial court does not abuse its discretion by allowing state to call a witness, who is not on state's witness list, for sole purpose of rebutting unforeseen testimony, absent showing of bad faith.

38. Criminal Law ⇐629.5(3)

Allowing witnesses, who were not on state's witness list, to testify at punishment phase was not abuse of discretion where there were no allegations of bad faith on part of the prosecution in failing to disclose witnesses and defendant could have reasonably anticipated that witnesses, who were related to him or had known him for years, would testify as to his reputation.

39. Criminal Law ⇐629.5(2)

Enforcement of rule that witnesses remain outside courtroom during testimony of other witnesses is within sound discretion of trial court, and trial court's actions will be disturbed only on showing of abuse of that discretion. Rules of Crim.Evid., Rule 613.

40. Criminal Law ⇐1153(5)

In determining whether trial court abused its discretion by not requiring witness to remain outside courtroom during testimony of other witnesses, Court of Appeals considers whether witness actually heard testimony or conferred with another witness without court permission, and whether witness' testimony contradicted testimony of witness he actually heard from opposing side or corroborated testimony of witness he actually heard from the same side on an issue of fact bearing upon issue of guilt or innocence. Rules of Crim.Evid., Rule 613.

41. Criminal Law ⇐665(4)

Admission of testimony of a witness, who may have been inside courtroom during testimony of other witnesses, having no personal knowledge of the offense is not an abuse of discretion. Rules of Crim.Evid., Rule 613.

42. Criminal Law ⇐665(4)

Admission of testimony of witness who was present in courtroom earlier in trial was not abuse of discretion where witness was called to rebut defense counsel's impeach-

ment of sexual assault victim, witness was moved from courtroom as soon as state became aware that he would be called to testify, and witness' testimony was limited to issue of impeachment and did not bear on defendant's guilt or innocence. Rules of Crim.Evid., Rule 613.

43. Criminal Law ⇐665(4)

Admission by witnesses during punishment phase of trial concerning defendant's reputation in the community was not abuse of discretion, even though witnesses may have been present during trial during other witness testimony, as reputation testimony was not relevant to defendant's guilt or innocence. Rules of Crim.Evid., Rule 613.

F. N. "Trey" Brown, III, Burnet, for Appellant.

Sam Oatman, Dist. Atty., John Morgan Minton, Asst. Dist. Atty., Llano, for Appellee.

Before CARROLL, C.J., and KIDD and B.A. SMITH, JJ.

BEA ANN SMITH, Justice.

A jury convicted appellant, Jeffrey Steven Marx, of aggravated sexual assault of a child and assessed punishment at imprisonment for twenty-three years. *See* Tex. Penal Code §§ 22.011, 22.021 (West 1994 & Supp.1997). Marx brings seven points of error contending the trial court erred by: (1) allowing two child witnesses to testify by closed-circuit television; (2) not suppressing his confession; (3) failing to afford him a *Batson* hearing; (4) denying him six challenges for cause; (5) admitting evidence of extraneous wrongs; (6) not allowing cross-examination of the victim concerning possibly exculpatory evidence; and (7) allowing testimony by witnesses not on the prosecution's witness list who were present in the courtroom during other testimony after the rule had been invoked. We will affirm the conviction.

FACTUAL AND PROCEDURAL BACKGROUND

In August 1994, thirteen-year-old B.J. told her grandfather and caseworkers at the children's advocacy center that Jeffrey Marx had sexually assaulted her earlier that summer. The next day, Investigator Jimmy Hopkins of the Burnet County Sheriff's Department obtained a warrant for Marx's arrest. While in custody, Marx confessed to having intercourse with B.J. when he and his wife took B.J. swimming at an area lake. He also admitted to engaging in sexual acts with four other girls, including two of his daughters and his niece J.M. Because Marx claimed he could not read or write, Chief Deputy Tim Moody entered the confession into a computer. A Burnet County grand jury subsequently indicted Marx for three counts of aggravated sexual assault against B.J. Count one of the indictment alleged genital penetration; counts two and three alleged penetration of the anus and digital penetration of the genitals, respectively.

Before trial, Marx filed two motions to suppress the confession, which he contended was taken in violation of his statutory and constitutional rights. *See* U.S. Const. amend. IV, XIV; Tex. Const. art. I, § 9; Tex.Code Crim. Proc. Ann. art. 38.22, § 2(a)(1–5) (West 1979). The trial court denied both motions. The prosecution filed a pretrial motion to allow B.J. and J.M., age six, to testify by two-way closed-circuit television. *See* Tex.Code Crim. Proc. Ann. § 38.071 (West Supp.1997). The trial court granted the State's motion. The jury found Marx guilty of count one but not guilty of counts two and three. The jury assessed punishment at twenty-three years of imprisonment.

DISCUSSION

Testimony by Closed–Circuit Television

In point of error one, Marx contends the trial court erred by allowing the two girls to testify by closed-circuit television because such testimony: (1) did not meet the prerequisites of article 38.071; (2) as applied, violated his right to confront the witnesses; and (3) facially and as applied, violated his right to due process of law. *See* U.S. Const. amend. V, VI, XIV; Tex.Code Crim. Proc. Ann. art. 38.071.

1. *Statutory Compliance and Confrontation Challenge*

[1–3] Section 1 of article 38.071 allows testimony to be given by closed-circuit television in a prosecution for aggravated sexual assault only if

> the offense is alleged to have been committed against a child 12 years of age or younger and if the trial court finds that the child is unavailable to testify at the trial of the offense, and applies only to the statements or testimony of that child[.]

Id. art. 38.071, § 1. Marx correctly notes that B.J. was thirteen years old at the time of this offense and J.M. was not the victim in this particular proceeding. He also contends the State failed to prove J.M. was "unavailable" as the statute requires. However, in *Gonzales v. State*, 818 S.W.2d 756 (Tex.Crim.App. 1991), the Texas Court of Criminal Appeals upheld a child witness's testimony by closed-circuit television even though she was not the victim of the charged offense and even though the offense (murder) was not one enumerated in the statute. *See id.* at 765. *Gonzales* teaches that the statute is not the only basis for permitting closed-circuit testimony by a child victim in Texas:

> [W]e see no reason why an expression of this important public policy must necessarily be in the form of an act or statute. More importantly, we have found nothing in any pertinent opinion from this Court or from the Supreme Court that would permit only the Legislature to make this "public policy" determination on behalf of the State.

Id. *Gonzales* involved a challenge to closed-circuit televised testimony on the ground it violated the defendant's confrontation right. *See* U.S. Const. amend. VI. The court of criminal appeals expressly adopted the United States Supreme Court's holding in *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), that the State has a sufficiently important interest in protecting child victims from the traumatic effects of testifying to justify the use of closed-circuit televised testimony under certain circumstances. *See Gonzales*, 818 S.W.2d at 765 (citing *Craig*, 497 U.S. at 855, 110 S.Ct. at 3168–69). To justify the procedure's use under *Craig* and now *Gonzales*, the trial court must determine that the procedure is necessary by hearing evidence and finding: (1) the procedure is necessary to protect the welfare of the particular child witness who seeks to testify; (2) the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant; and (3) the emotional distress suffered by the child witness in the presence of the defendant is not de minimis ("more than mere nervousness or excitement or some reluctance to testify"). *Gonzales*, 818 S.W.2d at 765 (citing *Craig*, 497 U.S. at 855–56, 110 S.Ct. at 3168–69); *Hightower v. State*, 822 S.W.2d 48, 51 (Tex. Crim.App.1991). This finding of necessity supplants the requirement of unavailability described in article 38.071. *See* Tex.Code Crim. Proc. Ann. art. 38.071, § 8. Accordingly, as long as the record in this case supports the finding of necessity, the trial court did not err by allowing B.J. and J.M. to testify by closed-circuit television merely because they did not meet the other requirements of article 38.071.

[4] We review the trial court's rulings in a hearing on necessity for an abuse of discretion. *See Hightower*, 822 S.W.2d at 53; *see also* Act of July 20, 1987, 70th Leg., 2d C.S., ch. 55, § 2, 1987 Tex. Gen. Laws 180, 185 (Tex.Code Crim. Proc. Ann. art. 38.071) (stating preference for affording "sufficient discretion" to trial courts applying statute). Review of a necessity hearing typically involves reviewing a trial court's findings of fact. *See Hightower*, 822 S.W.2d at 53; *Gonzales v. State*, 822 S.W.2d 189, 194 (Tex. App.—San Antonio 1991), *pet. granted and remanded*, 831 S.W.2d 326 (Tex.Crim.App. 1992) (later case involving Gonzales with a second victim); *Dufrene v. State*, 853 S.W.2d 86, 90 (Tex.App.—Houston [14th Dist.] 1993, pet. ref'd). Here the trial court did not record findings of fact. However, Marx did not request and does not challenge the absence of such findings. Therefore, we will determine whether the record supports the trial court's ultimate determination of necessity.

B.J.'s grandfather, Barney Raines, with whom she lived at the time of the offense and at trial, testified that B.J. was sixty percent

mentally retarded. B.J. had told her grandfather that Marx had threatened her. Raines felt that B.J. would suffer emotionally, and perhaps physically, if she testified in court. B.J. was in a special class for learning disabled students. Her teacher, Pat Fluitt, testified that B.J. had the educational level of a six or seven-year-old. Fluitt also related that B.J. dreaded testifying and had complained that she could not face Marx.

J.M.'s mother, Crystal Hayden, took the stand to express her concern that testifying in court would be harmful and traumatic to J.M. The mother also testified that J.M. was wetting her bed and having nightmares, although these had occurred before J.M. had been asked to testify. J.M.'s therapist, Dr. Anita Calvert, testified that J.M. was "a wreck" and did not want to see Marx. Dr. Calvert also testified, however, that J.M. was a strong girl and "would probably testify okay" if she had to. When the court inquired whether Dr. Calvert thought testifying in court would cause J.M. any emotional or physical problems, Dr. Calvert answered "I couldn't say for sure that there would not be. I wouldn't expect it."

[5, 6] In our opinion, this record supports the trial court's decision to permit the televised testimony of both child witnesses. Regarding the complainant B.J., the evidence was that she was very frightened of facing Marx in court and testifying in his presence would cause her to suffer psychological, perhaps even physical, harm. The trial court was justified in concluding the procedure was necessary to protect this fourteen-year-old victim who had the emotional maturity of a six or seven-year-old.

[7] Although there is less compelling evidence of the emotional distress that the eyewitness J.M. would suffer from testifying in the defendant's presence, the trial court was entitled to consider her tender age of six years and the fact that J.M. herself had allegedly been sexually assaulted by the defendant. The trauma to a child victim of confronting a perpetrator in the courtroom is not necessarily diminished because the subject of her testimony is the defendant's assault on another victim. Indeed, *Gonzales* permitted closed-circuit testimony by a child witness who had allegedly been sexually assaulted by the defendant. *See* 818 S.W.2d at 765.

After the trial court found it necessary to allow the complainant to testify by closed-circuit television, it may have determined that it would be less of a comment on the defendant's guilt or innocence to have both children testify in the same manner. To allow the fourteen-year-old complainant but not the six-year-old eyewitness to give closed-circuit testimony may have endangered the defendant's presumption of innocence more by emphasizing that the complainant alone needed special protection from this defendant.

[8] Finally, we note that in *Craig* the Supreme Court was reviewing the constitutionality of a statute that allowed alternative testimony only if the child's trauma was "such that the child cannot reasonably communicate." *Craig*, 497 U.S. at 856, 110 S.Ct. at 3169. But in finding that statute constitutional, the Court did not hold that a child witness's trauma must always rise to that level before closed-circuit testimony is constitutionally permissible. *Craig*, and accordingly *Gonzales*, require only that the emotional distress be caused by the defendant's presence and not the courtroom generally, and that the trauma be "more than mere nervousness or excitement or some reluctance to testify." *Id.; Gonzales*, 818 S.W.2d at 762. In light of this standard and the conflicting testimony regarding J.M.'s ability to testify in the defendant's presence, we conclude that the trial judge adequately balanced the defendant's constitutional rights against the state's interest in protecting these children from being further victimized. The trial judge was entitled to determine the weight and the credibility to be afforded the testimony regarding the level of J.M.'s emotional distress; likewise, the trial judge could have found it preferable to afford the same protection to both child-witnesses, rather than single out the complainant B.J. for seemingly special protection from the defendant. We hold that the trial court did not abuse its discretion by allowing the alternative testimonial procedure for both children.

2. *Due Process of Law*

Marx also asserts that the use of closed-circuit televised testimony deprives criminal defendants of their constitutional guarantee to be presumed innocent under the Due Process Clause of the Fifth and Fourteenth Amendments. *See* U.S. Const. amend. V, XIV.[1] He contends that a jury viewing the modified manner of testimony will necessarily infer from the State's protection of the witness that the defendant must have harmed the witness in some way. Marx challenges the *practice* of closed-circuit testimony, whether authorized by statute or by judicial discretion. Neither the court of criminal appeals nor the United States Supreme Court has addressed this specific constitutional challenge.

The presumption of innocence underlies the criminal defendant's right to a fair trial. *Holbrook v. Flynn*, 475 U.S. 560, 567, 106 S.Ct. 1340, 1344–45, 89 L.Ed.2d 525 (1986); *Taylor v. Kentucky*, 436 U.S. 478, 479, 98 S.Ct. 1930, 1931–32, 56 L.Ed.2d 468 (1978); *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 1692–93, 48 L.Ed.2d 126 (1976). The presumption embodies the principle that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Flynn*, 475 U.S. at 567, 106 S.Ct. at 1345 (quoting *Taylor*, 436 U.S. at 485, 98 S.Ct. at 1934–35). Although the State cannot eliminate from trial every reminder that it has chosen to seek conviction and punishment against a particular person, "certain practices pose such a threat to the 'fairness of the fact-finding process' that they must be subjected to 'close judicial scrutiny.'" *Id.* at 568, 106 S.Ct. at 1345.

[9, 10] To constitute reversible error based on the deprivation of a fair trial, the defendant must show that some courtroom procedure entailed either actual prejudice or inherent prejudice—"such a probability that prejudice will result that it is deemed inherently lacking in due process." *Estes v. Texas*, 381 U.S. 532, 542–43, 85 S.Ct. 1628, 1633, 14 L.Ed.2d 543 (1965). Specific challenges based on the right to be presumed innocent require a finding that the challenged practice creates "an unacceptable risk of impermissible factors" tending to erode the presumption of innocence. *Coy v. Iowa*, 487 U.S. 1012, 1034, 108 S.Ct. 2798, 2809–10, 101 L.Ed.2d 857 (1988) (Blackmun, J., dissenting); *Flynn*, 475 U.S. at 570, 106 S.Ct. at 1346–47; *Williams*, 425 U.S. at 505, 96 S.Ct. at 1693–94.

[11] Even a procedure found to be inherently prejudicial, however, may be justified if it furthers an essential state interest. *Flynn*, 475 U.S. at 568–69, 106 S.Ct. at 1345–46. In *Flynn*, the Court upheld the presence of four uniformed state troopers in the front row throughout the trial of six defendants accused of a massive bank robbery. *Id.* at 568, 106 S.Ct. at 1345–46. The Court reasoned that because the jury more likely thought the guards' presence was to maintain courtroom order, the State's interest in maintaining custody over the defendants, who had been denied bail, overrode any slight prejudice that may have existed in the jurors' minds. *Id.* at 571–72, 106 S.Ct. at 1347–48. Conversely, in *Williams*, the Court held that the defendant's wearing prison clothing in the courtroom, when the defendant had requested civilian clothing, violated his due process rights because the clothing was "so likely to be a continuing influence throughout the trial" on the jury's judgment and furthered no essential state policy. *Williams*, 425 U.S. at 505, 96 S.Ct. at 1693–94. Likewise, the Texas Court of Criminal Appeals held that, without evidence of violence or threatened violence during trial, even the gruesome nature of the crime alleged against the defendant would not justify the use of shackles in front of the jury. *Long v. State*, 823 S.W.2d 259, 283 (Tex.Crim.App.1991), *cert. denied*, 505 U.S. 1224, 112 S.Ct. 3042, 120 L.Ed.2d 910 (1992). But where the evidence overwhelmingly indicated that extreme measures were necessary to protect those present in the courtroom, the court upheld the use of handcuffs and leg irons on a defendant during the punishment phase of

1. Marx does not bring a separate challenge under the Texas Constitution.

the trial. *Marquez v. State*, 725 S.W.2d 217, 228–30 (Tex.Crim.App.), *cert. denied*, 484 U.S. 872, 108 S.Ct. 201, 98 L.Ed.2d 152 (1987); *see also Illinois v. Allen*, 397 U.S. 337, 344, 90 S.Ct. 1057, 1061, 25 L.Ed.2d 353 (1970).[2]

Marx claims the practice of testimony by closed-circuit television is inherently prejudicial. Our evaluation of this challenge must be based on reason, principle, and common human experience. *Williams*, 425 U.S. at 504, 96 S.Ct. at 1693. In *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988), Justice Blackmun, in a dissenting opinion, addressed a similar argument that the trial court's use of a screen between the child witness and the defendant violated the defendant's right to be presumed innocent. *See id.* at 1034, 108 S.Ct. at 2809–10 (Blackmun, J., dissenting).[3] He concluded that the use of the screen was not inherently prejudicial:

> Unlike clothing the defendant in prison garb, or having the defendant shackled and gagged, using the screening device did not brand appellant with an unmistakable mark of guilt. A screen is not the sort of trapping that generally is associated with those who have been convicted. It is therefore unlikely that the use of the screen had a subconscious effect on the jury's attitude toward appellant.

Id. at 1034–35, 108 S.Ct. at 2810 (citations omitted). Blackmun also noted that the trial court instructed the jury not to allow the screen to influence the verdict in any way. *Id.* at 1035, 108 S.Ct. at 2810.

Unlike the mere use of a screen as in *Coy*, closed-circuit testimony completely removes the child from the courtroom and prevents the child from seeing or hearing the defendant at all. The use of this uncommon, expensive, and elaborate procedure in a child abuse case may create an inference of the defendant's guilt in the jurors' minds. *See generally* Ralph H. Kohlmann, *The Presumption of Innocence: Patching the Tattered Cloak After* Maryland v. Craig, 27 St. Mary's Law Journal 389, 412 (1996) ("Kohlmann") (arguing alternative testimonial procedures "have the effect of placing shackles on the defendant in the eyes of the jury"); Robert H. King, Jr., *The Molested Child Witness and the Constitution: Should the Bill of Rights Be Transformed into the Bill of Preferences?*, 53 Ohio St. L.J. 49, 97 (1992) (testimony by closed circuit television poses substantial risk of erosion of presumption of innocence). *But see Wildermuth v. State*, 310 Md. 496, 530 A.2d 275, 292 (Ct.App.1987) (finding jury likely assumed procedure was used to reduce trauma *any* child might suffer through public testimony).

[12–14] However, the defendant's right to be presumed innocent is not absolute; even an inherently prejudicial practice may be constitutionally permissible if there is an overriding state interest that requires it. *See Craig*, 497 U.S. at 844, 849, 110 S.Ct. at 3162–63, 3165–66; *Flynn*, 475 U.S. at 571–72, 106 S.Ct. at 1347–48; *Marquez*, 725 S.W.2d at 230. In *Craig* and *Gonzales*, the essential state interest of protecting child witnesses from the trauma of testifying was found sufficiently important to justify an exception to the defendant's confrontation right. In *Craig*, the Court stated:

> Given the State's traditional and 'transcendent interest in protecting the welfare of children,' and buttressed by the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court, we will not second-guess the considered judgment of the Maryland Legislature regarding the importance of its interest in protecting child abuse victims from the emotional trauma of testifying.

2. *Allen* involved the trial court's *removal* of the unruly defendant from the courtroom. Struggling with the defendant's confrontation right to be present at his trial, the Court stated "in some situations which we need not attempt to foresee, binding and gagging might possibly be the fairest and most reasonable way to handle a defendant who acts as Allen did here." *Allen*, 397 U.S. at 343, 90 S.Ct. at 1061.

3. The majority did not address the due process challenge because it reversed on confrontation grounds, although it contemplated a possible exception to the confrontation right might exist. *Coy*, 487 U.S. at 1020, 108 S.Ct. at 2802–03. Two years later the Court found that exception when it upheld Maryland's statute in *Craig*. *Craig*, 497 U.S. at 852, 110 S.Ct. at 3167.

Craig, 497 U.S. at 855, 110 S.Ct. at 3168–69; *see also Osborne v. Ohio*, 495 U.S. 103, 109, 110 S.Ct. 1691, 1696, 109 L.Ed.2d 98 (1990) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.' "). Both psychological and legal commentators recognize the traumatic effects of courtroom testimony on child victims. *See, e.g.*, Burgess & Holstrom, *The Child and Family During the Court Process*, in *Sexual Assault of Children and Adolescents* 205 (1978) (failure to protect child results in further traumatization by court procedures through which child must "relive" the sexual assault); Nancy W. Perry and Lawrence S. Wrightsman, *The Child Witness: Legal Issues and Dilemmas* 135–38 (1991) ("Even defense attorneys acknowledge that involvement in legal proceedings can be devastating to children.") (citation omitted); Libai, *The Protection of the Child Victim of a Sexual Offense in The Criminal Justice System*, 15 Wayne L.Rev. 977, 978–79 (1969); Beth McAllister, Comment, *Article 38.071 of the Texas Code of Criminal Procedure: A Legislative Response to the Needs of Children in the Courtroom*, 18 St. Mary's Law Journal 279, 295–97 (1986). In addition, the Texas Legislature has recognized a public policy of protecting child abuse victims from the harms of courtroom testimony. *See* Act of July 20, 1987, 70th Leg., 2d C.S., ch. 55, § 2, 1987 Tex. Gen. Laws 180, 185 (Tex.Code Crim. Proc. Ann. art. 38.071). Therefore, we are guided by *Craig*, *Gonzales*, the Texas Legislature, and the abundant literature on the harmful effects of eliciting courtroom testimony from child victims to hold that, when the trial court finds it is necessary for the individual witness's well-being, the use of closed-circuit televised testimony does not violate the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution. We are confident that trial courts will exercise caution and reason in balancing the defendant's important constitutional rights against the equally important state interest of protecting child victims from further victimization in the courtroom.

[15] Because the procedure affects the defendant's presumption of innocence, however, its use warrants an additional jury instruction to minimize the potential prejudice the accused may suffer. In balancing a defendant's confrontation right in *Craig*, the Supreme Court also considered other means of assuring the reliability of witnesses' testimony and preserving the adversarial nature of the trial. *Craig*, 497 U.S. at 851, 110 S.Ct. at 3166–67. The Court reasoned that the essence of the confrontation right was safeguarded where the testimony's reliability was otherwise assured by rigorous cross-examination and other adversarial safeguards.[4] *Id.* The presumption of innocence involves the inferences that may be drawn from the State's accusations against and the manner of prosecution of the defendant.

> "[I]n a criminal case the term [presumption of innocence] ... cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced." ... [It cautions the jury to consider] *nothing but the evidence.*

Taylor, 436 U.S. at 484–85, 98 S.Ct. at 1934 (quoting 9 J. Wigmore, *Evidence* § 2511 (3d ed.1940)). Its importance has led to the policy of requiring trial judges in every criminal trial to impress upon juries the defendant's presumed innocence. *See Taylor*, 436 U.S. at 490, 98 S.Ct. at 1937. An additional instruction when closed-circuit television is used will strike an adequate balance between preserving the defendant's presumption of innocence and fostering the State's interest in protecting child victims.

[16] In the present case, before the televised testimony began, the trial court stated to the jury:

> Ladies and gentlemen, I'm going to give you an instruction at this time. Our statutes provide that the testimony of children in these types of cases can be taken by what we call closed circuit television, and

4. The Court noted that the child witnesses testified under oath, were subject to full cross-examination, and were observed by the judge, jury, and defendant as they testified. *Craig*, 497 U.S. at 857, 110 S.Ct. at 3169–70.

that is what's going to be taking place here for the next couple of witnesses.

The court then explained how the procedure would work; he advised that the television would be turned on and off in order to hear objections. The court's explanation that "our statutes" allow the procedure in "these types of cases" likely conveyed to the jury the state's general desire to protect children from the intimidating courtroom demeanor rather than implying that the procedure was being used in this particular case due to circumstances involving this particular defendant. Although an additional instruction may have been desirable,[5] Marx did not request a special instruction and the statute did not apprise the court of a duty to give one. The trial court did generally instruct the jury to presume Marx's innocence before considering the evidence against him when it delivered the jury charge. We accordingly hold that the use of closed-circuit televised testimony was not unconstitutionally applied in this case. We overrule Marx's first point of error.

***Batson* Challenges**

In his second point of error, Marx contends the trial court erred by refusing to hold a *Batson* hearing on whether the prosecutor's peremptory challenges were racially motivated. *See Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *Keeton v. State*, 724 S.W.2d 58, 66 (Tex.Crim.App.1987). At jury voir dire and after each party exercised its challenges for cause, the State used two of its six peremptory challenges to strike two of three African–Americans on the venire.[6] The third African–American served on the jury. Marx objected that the strikes exercised against the two African–Americans were racially motivated, and asked the trial court to conduct a hearing. The trial court denied the motion because the defendant was not of the same race as the jurors who were struck. On February 6, 1997, we abated this appeal and ordered the trial court to hold a hearing to allow the prosecutor to explain the reasons behind the peremptory challenges exercised against the two African–Americans. *See Powers v. Ohio*, 499 U.S. 400, 416, 111 S.Ct. 1364, 1373–74, 113 L.Ed.2d 411 (1991) (a defendant need not be of the same race as the wrongfully excluded jurors to make a cognizable *Batson* claim); *Linscomb v. State*, 829 S.W.2d 164, 166 (Tex.Crim.App.1992) (a defendant need only present relevant evidence with "more than a modicum of probative value" to merit a *Batson* hearing). The trial court held the hearing on March 18, 1997, and the supplemental transcript and statement of facts from that hearing have been forwarded to this Court. Marx has not provided us with supplemental briefing or a point of error contending the prosecutor's reasons given at the hearing were racially motivated. Therefore, having been granted the desired hearing, point of error two is now moot and may be overruled. In the interest of justice, however, we will address the point as including the argument that the prosecutor's professed reasons for the two peremptory strikes were pretexts for racially motivated exclusion of the African–American venire members.

At the *Batson* hearing, the prosecutor who tried the case testified under oath giving his reasons for striking the two African–American jurors, Myrtice Foster and James Louis Crawford. Based on his voir dire notes, he testified that he struck Ms. Foster because she claimed to be illiterate, having only a seventh-grade education. He testified he remembered learning that Mr. Crawford had possibly been arrested for burglary. Defense counsel attempted to impeach this testimony concerning Mr. Crawford with the prosecutor's prior statements, made the day after Marx requested and was denied the *Batson* hearing, that he struck Mr. Crawford because Mr. Crawford's comments at voir dire indicated he would be unable to make a decision in a case of this nature.

[17] In reviewing a trial court's rulings at a *Batson* hearing, we determine whether the

5. *See* Kohlmann, *supra*, at 417. Kohlmann's article provides several proposed jury instructions and discusses the concerns that such an instruction should address. *See generally id.* at 416–419 nn. 129–133.

6. Because only twenty-eight persons remained on the venire after the parties made their challenges for cause, the State was permitted six, rather than the usual ten, peremptory challenges.

trial judge's decision was supported by the record so that it is not clearly erroneous. *See Vargas v. State*, 838 S.W.2d 552, 554 (Tex.Crim.App.1992). Under this "clear error" standard of review, we should defer to the trial court's decision unless we are left with a "definite and firm conviction that a mistake has been committed." *Id.* (quoting *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991)). We apply this standard by considering the record, including the voir dire and the racial makeup of the venire, the prosecutor's neutral explanations, and appellant's rebuttal and impeaching evidence. *Id.*

[18] We conclude that the trial court did not err in finding that the prosecutor's reasons for striking these two jurors were racially neutral.[7] The prosecutor's voir dire notes indicate that Ms. Foster claimed she was illiterate and had a seventh-grade education. In addition, both at the original proceeding and at this *Batson* hearing, the prosecutor gave racially neutral reasons for striking Mr. Crawford. The fact that the prosecutor gave different reasons at the recent hearing and two years earlier does not show that they were pretexts for racial discrimination; he could have had more than one reason and not communicated the possible burglary arrest at the original proceeding, since there was no formal *Batson* hearing. The record does show that Mr. Crawford had changed his position on whether he could presume the defendant innocent. It is not unusual that the prosecutor would forget this occurrence two years later but remember the possible arrest. Considering the voir dire record, the prosecutor's racially neutral reasons, and the fact that the third African–American on the venire actually served on the jury, we are not left with a firm conviction upon review of this record that the prosecutor's peremptory strikes were racially motivated. We overrule point of error two.

7. At the *Batson* hearing ordered by this Court, the trial court refused to make findings of fact regarding the defendant's *Batson* challenges because we did not specifically order it to do so in our order. We do not think we should have to spell out the steps a trial court should take in holding a *Batson* hearing. In the interest of judicial efficiency, we will review the record of the hearing as containing an implicit ruling denying the defendant's *Batson* challenges because the prosecutor's reasons were racially neutral.

Challenges for Cause

[19] In his third point of error, Marx contends the trial court erred in denying his challenges for cause against six venirepersons. In particular, Marx complains of rulings on his challenges to prospective jurors Ulbricht, Sharp, McGuire, Carlile, Clark, and Goble. The record shows that defense counsel properly preserved error by exercising six peremptory challenges to exclude these jurors, exhausting all of his peremptory challenges, and requesting six additional peremptory challenges that were denied. Marx contends he was forced to accept five objectionable jurors on the jury as the result of the trial court's error in overruling his challenges for cause. *See Felder v. State*, 758 S.W.2d 760, 766–67 (Tex.Crim.App.1988).

[20–22] To prevail on a challenge for cause, the defendant must demonstrate either a bias against himself or against a rule of law upon which he was entitled to rely. *Cordova v. State*, 733 S.W.2d 175, 179 (Tex.Crim.App.1987), *cert. denied*, 487 U.S. 1240, 108 S.Ct. 2915, 101 L.Ed.2d 946 (1988). The trial court must determine whether the potential jurors' views would prevent or substantially impair their duties to act in accordance with the trial judge's instructions and jurors' oaths. *See Kemp v. State*, 846 S.W.2d 289 (Tex.Crim.App.1992), *cert. denied*, 508 U.S. 918, 113 S.Ct. 2361, 124 L.Ed.2d 268 (1993). The trial judge's determination, and our review, should be based on the voir dire examination of the prospective jurors *taken as a whole*. *Mooney v. State*, 817 S.W.2d 693, 701 (Tex.Crim.App.1991); *Cordova*, 733 S.W.2d at 179. A prospective juror who initially equivocates on her answers is not challengeable for cause if she ultimately states she can follow the trial court's instructions and render a verdict based on the evidence. *Adanandus v. State*, 866 S.W.2d 210 (Tex.Crim.App.1993), *cert. denied*, 510 U.S. 1215, 114 S.Ct. 1338, 127 L.Ed.2d 686 (1994).

Prospective jurors Ulbricht and Carlile initially indicated they would have difficulty being impartial in this case. Mr. Ulbricht's daughter had been molested, and Ms. Carlile taught at B.J.'s school and often saw B.J. in the halls. Nevertheless, Mr. Ulbricht emphatically stated that his experience would not affect his ability to be fair and impartial. Although Ms. Carlile originally stated she might be more sympathetic to B.J.'s testimony, upon further questioning she stated that she could put her personal knowledge of B.J. aside and base her decision solely on the evidence.

Prospective jurors Sharp and Clark indicated they would have difficulty considering the minimum punishment if Marx were found guilty. Upon further questioning, Mr. Sharp stated that under the proper circumstances he could consider the minimum punishment. Ms. Clark also stated that, "if the evidence showed me there was a reason," she could consider the minimum.

Mr. McGuire originally stated he presumed Marx guilty, but upon further voir dire stated he would base his decision solely on the evidence adduced at trial. Mr. Goble was acquainted with Marx and thought he had questionable character. However, Mr. Goble explicitly stated that he could keep his opinion of Marx's character completely separate and was not biased against him.

The voir dire examination of each of these prospective jurors, taken as a whole, indicates that none of them was biased against the defendant or the applicable law. Each testified he or she would be able to consider the evidence impartially in reaching a verdict. We hold that the trial court did not err in denying Marx's challenges for cause in each instance. We overrule point of error three.

Confession

In his fourth point of error, Marx contends the trial court erred in not suppressing his confession because (1) it does not show on its face that Marx was given and waived his *Miranda* warnings, as statutorily required, *see* Tex.Code Crim. Proc. Ann. art. 38.22, § 2 (West 1979), and (2) it was taken while he was in custody pursuant to an illegal arrest warrant. *See* U.S. Const. amend. IV, XIV.

1. *Compliance with Article 38.22*

Article 38.22, section 2, requires the mandatory warnings to be reflected *on the face of* any statement used against an accused in a criminal proceeding. Tex.Code Crim. Proc. Ann. art. 38.22, § 2 (West 1979). Marx's confession consists of a form entitled "Voluntary Statement" and two computer-printed pages containing the text of the confession. The form lists the warnings required by article 38.22 and states that the signer has been informed of and voluntarily waived those rights prior to giving the statement. The form then reserves space for a handwritten statement. However, because Marx could neither read nor write, his verbal statement was transcribed and attached to the form. Marx contends that because the admonishments appear on the form but not on the computer-printed pages, the statement does not comply with article 38.22.

The State responds that Marx waived error by not objecting at trial to the statement's noncompliance with article 38.22. After the jury was sworn but outside its presence, the trial court held a suppression hearing. Defense counsel objected when the State offered State's Exhibits 1 and 1-A, unedited and edited versions, respectively, of Marx's confession. Defense counsel objected to "the voluntariness and the validity" of the confession, and renewed this objection later at trial when the State offered Exhibit 1-A. The trial court overruled the objections. Defense counsel's objections to voluntariness properly preserved error on whether the statement facially showed the required admonishments.

In *Garcia v. State*, 919 S.W.2d 370 (Tex.Crim.App.1994) (opinion on rehearing), the court of criminal appeals sought to determine whether the defendant's written statement complied with the legislative intent expressed in article 38.22 by asking whether the defendant knowingly, intelligently, and voluntarily waived the rights listed in the statute. *Id.* at 386. Here the trial court found that Officer Hopkins had advised Marx of his constitutional rights, which Marx had acknowledged and waived by signing the form. The trial

court concluded that because the form referred to the computer-drafted statement, the admonishments constituted a part of the statement. Finally, the trial court found that Marx gave his confession freely and voluntarily, without requesting an attorney or termination of the interview.

[23–25] We review a trial court's rulings at a suppression hearing for an abuse of discretion. The trial court is the sole trier of fact and judge of the credibility of witnesses and the weight to be given their testimony. *Romero v. State*, 800 S.W.2d 539, 543 (Tex.Crim.App.1990). The trial court may accept or reject any or all of a witness's testimony or evidence offered. *Alvarado v. State*, 853 S.W.2d 17, 23 (Tex.Crim.App.1993). In reviewing the trial court's decision, an appellate court does not engage in its own factual review; it determines only whether the record supports the trial court's finding. *Romero*, 800 S.W.2d at 543.

[26] Marx admitted to signing the form both below the printed admonishments and below the notation that the statement was taken on the computer. In addition, the first two paragraphs of the transcribed statement state that Marx gave the statement "voluntarily of his own free will and without any promises or offers of leniency or favors, and without compulsion or persuasion by any person or persons whomever." The last paragraph, which appears alone on the next page, states, "I can not read but this statement consisting of three page(s) was read to me. Each page bears my signature, and I do affirm that all facts and statements contained herein are true and correct." [8]

At the hearing, Hopkins testified that he gave Marx the required warnings before Marx gave his statement and that Marx said he understood his rights. Hopkins wrote on the form that the statement would be taken by computer, and both he and Marx signed the form. As Marx answered Hopkins' questions regarding the girls, Officer Moody typed the confession into the computer. After the interrogation ended, Officer Moody read each line off the computer to Marx and asked if he wanted to change or add anything; Marx did not. Hopkins handed the printed statement to Marx, but Marx gave it back, saying he could not read.[9] Hopkins then read the statement to Marx, who afterward signed all three pages.

Marx testified that he only agreed to give a statement after a deputy told him that Hopkins was planning to arrest Marx's wife, Denise Wolverton. Marx said he "felt threatened" by this information and so he told the deputy he would give Hopkins whatever he wanted to prevent his wife from being arrested. Marx also testified that he did not remember the two computer printouts being part of his statement. He recognized his signature on the form and thought it "seem[ed] to be" his signature on the computer-printed pages. Marx claimed the computer-generated pages were not his statement, that he merely repeated what Hopkins told him to say. Marx denied that the statement was read back to him.

The trial court was entitled to believe the officer's testimony that he read the statement to Marx, who voluntarily waived his rights by signing the statement. Marx's signature appears twice on the "Voluntary Statement" form and on each page of the confession. Both documents state that he waived the rights set out in article 38.22. This is sufficient evidence of compliance with article 38.22. *See Garcia*, 919 S.W.2d at 386; *Cannon v. State*, 691 S.W.2d 664, 674 (Tex.Crim.App.1985), *cert. denied*, 474 U.S. 1110, 106 S.Ct. 897, 88 L.Ed.2d 931 (1986); *Raetzsch v. State*, 745 S.W.2d 520, 524 (Tex.App.—Corpus Christi 1988, pet. ref'd). We conclude that the record supports the trial court's findings that Marx was properly admonished and voluntarily gave the statement.

2. *Arrest Warrant*

Marx also contends his confession should have been suppressed because it was taken

8. Two copies of the statement were introduced into evidence, the only difference being that "I have read this statement ..." was changed to "I can not read but this statement ... was read to me."

9. On cross-examination, the prosecutor introduced a six-page handwritten letter, which Marx admitted to having written to his wife. Marx then stated he could not read or write "very good."

while he was in custody pursuant to an illegal arrest warrant. Officer Hopkins' handwritten affidavit in support of the warrant stated:

VIDEO RECORDED STATEMENT OF VICTIM BURNET DOE 11-94 [10]

CORROBORATING STATEMENT OF WITNESS WRITTEN

FIRST CRY STATEMENT GIVEN TO THIS OFFICER IN PERSON

SUSPECT HAD ACCESS TO VICTIM AT THE TIME VICTIM WAS SEXUALLY ASSAULTED

Officer Hopkins also prepared a second affidavit and obtained a second arrest warrant concerning the sexual assault by Marx.[11] Marx contends that the affidavits alleged insufficient facts to support issuance of the arrest warrants.

[27, 28] An affidavit supporting the issuance of an arrest warrant must contain more than merely conclusory statements by the officer. *Gordon v. State*, 801 S.W.2d 899, 913 (Tex.Crim.App.1990). It must contain sufficient facts supporting the officer's personal knowledge or belief of the alleged facts such that a neutral and detached magistrate may determine whether probable cause exists. *Id.* at 914. A written statement that is the product of an illegal arrest is inadmissible as evidence against the accused. *Green v. State*, 615 S.W.2d 700, 708 (Tex.Crim.App.), *cert. denied*, 454 U.S. 952, 102 S.Ct. 490, 70 L.Ed.2d 258 (1981).

[29] Although the affidavits use fragmented statements to communicate the officer's knowledge, they state more than mere conclusions. Each affidavit alleges that Hopkins had viewed a video-recorded statement of the victim, had personally heard an outcry from the victim and had taken a corroborating statement from a witness who allegedly witnessed the offense. The officer had also verified that Marx had access to the victim at the time of the allegations. The affidavits provided the magistrate with enough information to determine that probable cause existed to arrest Marx. Because the arrest was not illegal, the trial court properly refused to suppress the confession on that ground. We overrule point of error four.

Evidence of Extraneous Offenses

[30] In point of error five, Marx complains the trial court erred in admitting the edited copy of his confession because it contained phrases that constituted inadmissible character evidence under Texas Rule of Criminal Evidence 404(b). Specifically, the edited version of the confession admitted in evidence contains the statements, "I ejaculated *every time* I did something," and "I knew *these girls* were children when I did it." Marx contends the italicized words in particular convey to a jury evidence of assaults against children other than the victim. He also claims the prejudicial effect of these statements outweighs their probative value. *See* Tex.R.Crim. Evid. 403.

[31, 32] Evidence of extraneous acts is admissible if it has relevance beyond its tendency to prove character and if its probative value substantially outweighs the danger of unfair prejudice. *See* Tex.R.Crim. Evid. 404(b); *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex.Crim.App.1990). The admission of extraneous offense evidence lies within the sound discretion of the trial court and will be reversed only for an abuse of that discretion. *Ransom v. State*, 920 S.W.2d 288, 300 (Tex.Crim.App.), *cert. denied*, — U.S. —, 117 S.Ct. 587, 136 L.Ed.2d 516 (1996); *Montgomery*, 810 S.W.2d at 391; *Zuliani v. State*, 903 S.W.2d 812, 826 (Tex. App.—Austin 1995, pet. ref'd).

The complained-of statements are probative of the appellant's motive and knowledge in committing the offense charged—showing

10. Officer Hopkins testified that court officials in Burnet County customarily use pseudonyms for victims of sexual assault cases. "Burnet Doe 11-94" was the pseudonym given to the complainant.

11. "Burnet Doe 10-94" referred to another alleged sexual assault victim of Marx. The second affidavit was nearly identical:

VIDEO RECORDED STATEMENT OF VICTIM
FIRST CRY STATEMENT OF WITNESS
CORROBORATING STATEMENT OF A SECOND VICTIM WHO WITNESSED THE OFFENSE
SUSPECT HAD ACCESS TO VICTIM
VICTIM'S SIGNS OF SEXUAL ABUSE

the motive of sexual gratification and knowledge that B.J. was only a child. Therefore, they were admissible for these purposes. *See* Tex.R.Crim. Evid. 404(b); *McDonald v. State*, 513 S.W.2d 44, 51 (Tex.Crim.App. 1974); *Cummings v. State*, 651 S.W.2d 14, 17-18 (Tex.App.—Amarillo 1983, no pet.). Moreover, it is not clear that the statements refer to acts other than the three counts of sexual assault alleged in the indictment. The reference to "these girls" could have referred to the presence of the victim and the testifying witness; it does not necessarily imply that the defendant assaulted anyone other than the victim. We hold the trial court did not abuse its discretion in admitting these statements as part of the redacted confession. We overrule point of error five.

Past Sexual Conduct

In his sixth point of error, Marx contends the trial court erred by excluding evidence of B.J.'s past sexual conduct. Marx contends this evidence was relevant because it would have provided the jury with another explanation for B.J.'s broken hymen. Dr. Sandra Thomas conducted a medical examination of B.J. on August 31, 1994, two months after the assault. On cross-examination, Dr. Thomas testified that she could not tell how long before the examination B.J. had been penetrated—it could have been two weeks or two years.

During B.J.'s testimony, defense counsel attempted to elicit testimony that B.J. had been sexually abused by an uncle prior to this offense. The trial court sustained the State's objection to the evidence as being irrelevant and immaterial. *See* Tex.R.Crim. Evid. 401, 412. Defense counsel requested and made a bill of exception, during which B.J. testified that her uncle had "put his thing in" her sometime before the incident with Marx. The trial court again denied Marx's request to introduce the evidence concerning the uncle in front of the jury.

Texas Rule of Criminal Evidence 412 governs the admissibility of evidence of previous sexual conduct. Specific instances of a victim's past sexual conduct are admissible only if three conditions are met: (1) the evidence falls within one of the limited exceptions in Rule 412(b)(2); (2) the defendant informs the court outside the jury's presence prior to introducing the evidence *or asking any such question* of his intent to do so; *and* (3) the trial court finds that the probative value of the evidence outweighs the danger of unfair prejudice. Tex.R.Crim. Evid. 412 (emphasis added). We review the trial court's decision to admit or exclude the evidence under an abuse of discretion standard. *Wofford v. State*, 903 S.W.2d 796, 799 (Tex.App.—Dallas 1995, pet. ref'd).

[33] First, appellant did not inform the court of his intention to inquire into the incident concerning the uncle prior to asking the witness about it. Instead, appellant attempted to ask about the incident on cross-examination in front of the jury, whereupon the State objected. Because Marx did not meet Rule 412's procedural requirement for introducing this evidence, he cannot now complain of its exclusion. *See Golden v. State*, 762 S.W.2d 630, 632 (Tex.App.—Texarkana 1988, pet. ref'd).

[34] Moreover, even assuming Marx had informed the court of his intent to inquire into the incident, we hold the trial court did not abuse its discretion in excluding the evidence. Marx argues the evidence was "necessary to rebut or explain scientific or medical evidence offered by the state." *See* Tex. R.Crim. Evid. 412(b)(2)(A). The State introduced Dr. Thomas's testimony to show that the thirteen-year-old B.J. had been sexually assaulted. Dr. Thomas testified that she could not tell *when* B.J. had been penetrated; thus her medical testimony did not tend to corroborate B.J.'s identification of Marx as the assailant. Therefore, the excluded evidence was not *necessary* to explain or rebut the State's evidence; the fact that B.J. may have been assaulted some other time was immaterial. Furthermore, we gather from the record that the trial judge felt that the unfair prejudice suffered by B.J. if forced to testify concerning the prior incident outweighed the probative value of the testimony. We agree the testimony did not meet the balancing test. *See* Tex.R.Crim. Evid. 412(b)(3); *Allen*, 700 S.W.2d at 930. We overrule the sixth point of error.

Witness Testimony

Marx's seventh point of error complains that the trial court erroneously allowed witnesses to testify who were not on the State's witness list and were present in the courtroom during the trial even though the rule had been invoked. *See* Tex.Code Crim. Proc. Ann. art. 36.05 (West 1981); Tex.R.Crim. Evid. 613. During the guilt-innocence phase of trial, the State called one rebuttal witness; during the punishment phase, it called three other witnesses not on its witness list.

[35–37] We review a trial court's allowing the testimony of witnesses that were not on the State's witness list for an abuse of discretion. *Hightower v. State*, 629 S.W.2d 920, 925 (Tex.Crim.App.1981). In determining whether the trial court abused its discretion, we consider whether the prosecutor engaged in bad faith by not disclosing the witness's name, and whether the defendant could reasonably anticipate that the witness would testify although his or her name was not on the list. *Id.; Clay v. State*, 505 S.W.2d 882, 885 (Tex.Crim.App.1974). Absent a showing of bad faith, a trial court does not abuse its discretion by allowing the State to call a witness for the sole purpose of rebutting unforeseen testimony. *Hightower*, 629 S.W.2d at 925; *Doyle v. State*, 875 S.W.2d 21, 22 (Tex.App.—Tyler 1994, no pet.).

The State called Darrell Wolverton as a rebuttal witness. In response to defense counsel's objection, the prosecutor stated that he did not anticipate calling Wolverton until that day. Wolverton testified on the existence and condition of the doorlock to the trailer in which the offense occurred. B.J. had testified that Marx locked the door with a slide-lock from the inside during the commission of the offense; defense counsel had introduced impeachment evidence that there was no way to lock the door from the inside. On rebuttal, Wolverton testified that the inside of the door had a chain-lock with a groove which the chain slid into. The State was entitled to call Wolverton to rebut the defense's impeachment evidence.

[38] At the punishment phase, the State called Vicki Sealy, Wanda Smith, and Sandra Wolverton. Vicki Sealy testified she had known appellant for nine or ten years. Wanda Smith testified she had known appellant for eight years. Both Sealy and Smith are related to Marx's niece J.M. Sandra Wolverton was apparently related to Marx's wife, Denise Wolverton; she testified she had known appellant for nine years. All three women, when asked whether Marx's reputation in the community for being a peaceful and law-abiding citizen was good or bad, answered that it was bad. Although these three witnesses were not on the State's list, Marx could have reasonably anticipated that these three women who were related to him and had known him for years would testify concerning his reputation. There were no allegations of bad faith on the part of the prosecution in failing to disclose these witnesses. We hold the trial court did not abuse its discretion in allowing them to testify.

[39–41] Marx also contends these witnesses' testimony was taken in violation of the rule allowing the trial court to require witnesses to remain outside the courtroom during the testimony of other witnesses. *See* Tex.R.Crim. Evid. 613. Enforcement of the rule lies within the sound discretion of the trial court; its actions will be disturbed only upon a showing of an abuse of discretion. *Cooks v. State*, 844 S.W.2d 697, 733 (Tex.Crim.App.1992), *cert. denied*, 509 U.S. 927, 113 S.Ct. 3048, 125 L.Ed.2d 732 (1993). In determining whether the trial court abused its discretion, we must consider: (1) whether the witness actually heard the testimony or conferred with another witness without court permission; and (2) whether the witness's testimony contradicted the testimony of a witness he actually heard from the opposing side or corroborated the testimony of a witness he actually heard from the same side on an issue of fact bearing upon the issue of guilt or innocence. *Id.; Guerra v. State*, 771 S.W.2d 453, 476 (Tex.Crim.App.1988). The admission of testimony of a witness having no personal knowledge of the offense is not an abuse of discretion. *Guerra*, 771 S.W.2d at 476.

[42] When defense counsel objected to Darrell Wolverton's presence in the courtroom earlier in the trial, the prosecutor told

the court that Wolverton was removed from the courtroom as soon as the State became aware he would be called to testify. Wolverton's testimony was limited to the issue of the existence and condition of the doorlock in an attempt to cure the impeachment evidence introduced by the defense and did not bear on the defendant's guilt or innocence. The trial court did not abuse its discretion in admitting the testimony of Darrell Wolverton.

[43] Each of the three complained-of witnesses called during the punishment phase gave only opinions as to Marx's reputation in the community. Because such testimony was not relevant to Marx's guilt or innocence, its admission was not an abuse of discretion. We overrule the seventh point of error.

CONCLUSION

Testimony by closed-circuit television does not violate a criminal defendant's right to due process of law when the trial court finds the procedure to be necessary to the well-being of the child. The trial court should instruct the jury that the televised testimony shall not be taken as a comment on the defendant's guilt. In this case, where the requisite finding of necessity was supported by the record, and the defendant did not request a special instruction but the trial court instructed the jury that Texas statutes authorize testimony by closed-circuit television, the alternative form of testimony did not violate the defendant's right to be presumed innocent. We find the appellant's other points of error to be without merit and, accordingly, affirm the conviction.

KIDD, Justice, concurring.

This appeal requires a balancing of two powerful and competing interests: society's legitimate concern for the welfare and protection of child witnesses versus the constitutional rights of the accused to confront his accusers and to be presumed innocent until proven guilty. Upon the State's motion, the trial court permitted the thirteen-year-old complainant and a six-year-old witness [1] to testify outside the presence of the appellant by way of closed-circuit television. Relying largely on the strength of *Gonzales v. State*, 818 S.W.2d 756 (Tex.Crim.App.1991), the majority affirms. I choose to write separately to express my concerns regarding the majority opinion, which I believe broadens the reach of *Gonzales* and ensures that, for child witnesses, testimony by closed-circuit television will become the rule rather than the exception. By way of specific example, I would hold that the trial court erred in permitting the nonvictim child witness to testify outside the presence of the appellant and the jury.

The trial court held a pretrial hearing and heard testimony to determine whether the nonvictim witness should be allowed to testify by closed-circuit television. To place the pretrial-hearing testimony in context, it is necessary to briefly review the case law in this area. In *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988), the United States Supreme Court held that the Confrontation Clause of the Sixth Amendment provides the accused the right to *confront* face-to-face at trial the witnesses who testify against him. The Supreme Court held that confrontation was a *core guarantee* that ensures a fair trial and preserves the integrity of the fact-finding process in its search for the truth.

Justice Scalia, speaking for the Court, put it this way:

> The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses, since that is the very phenomenon it relies upon to establish the potential "trauma" that allegedly justified the extraordinary procedure in the present case. That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.

Id. at 1020, 108 S.Ct. at 2802.

The Court held that the placement of a screen, authorized by the Iowa statute, be-

1. In a separate cause, the appellant was accused of aggravated sexual assault of this witness. However, this child's testimony at trial did not involve any of the facts of that alleged criminal episode, but rather some alleged eyewitness testimony regarding the incident on trial.

tween the defendant and the child sexual assault victims during their testimony at trial violated the Confrontation Clause of the Sixth Amendment. Justice O'Connor, joined by Justice White, concurred in a separate opinion. She agreed that the Confrontation Clause was violated in the *Coy* case, but noted her view that the rights involved were not absolute and might be subject to exceptions.

Two years later, Justice O'Connor writing for the Court found such an exception in the case of *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). In *Craig*, the Court upheld a Maryland statute which permitted the fact-finder to receive, by closed-circuit television, the testimony of a child witness alleged to be the victim of child abuse, *if* the trial judge first determined that the testimony of the child victim in open court and in the presence of the defendant would result in the child suffering *serious* emotional distress to the extent that the child *could not reasonably communicate*.

Coy and *Craig*, then, set the stage for the Court of Criminal Appeals decision in *Gonzales v. State*, 818 S.W.2d 756 (Tex.Crim.App. 1991). In *Gonzales* the court permitted a nonvictim child eyewitness in a murder case to testify by closed-circuit television. However, the court specifically recognized that the trial judge was required to hear evidence and make the following specific findings in order to deviate from normal courtroom procedure:

> First, [that] use of the one-way closed-circuit procedure is necessary to protect the welfare of the particular child witness who seeks to testify. Second, the trial court must also find that the child witness would be traumatized, not only by the courtroom generally, but by the presence of the defendant. Third ..., the trial court must determine that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis, i.e., more than mere nervousness or excitement or some reluctance to testify.

Gonzales, 818 S.W.2d at 762. *See also Hightower v. State*, 822 S.W.2d 48, 51 (Tex.Crim. App.1991).

Applying *Gonzales* to the testimony presented at the pretrial hearing in this cause, the majority concludes that the trial court did not err in permitting the nonvictim child witness to testify by closed-circuit television. I disagree.

At the pretrial hearing, the State called two witnesses—the child's natural mother and an expert witness with a license in professional counseling who had experience with child victims in sexual assault cases.

On direct examination the mother testified that her daughter had shown fear toward appellant but stated regarding whether her daughter could testify in open court that she was "ready for it" and "said she wanted to come." On cross examination, when defense counsel explained to the mother that the child would not be testifying regarding the facts of her own complaint but merely as an eyewitness to some facts regarding the incident on trial, the mother unequivocally testified "well, that she's okay with. I mean, she's ready for that."

The expert witness was even more emphatic regarding the child's ability to give testimony in open court. In response to the prosecution's questions the expert stated as follows:

> Q. Okay. Doctor, do you feel like if she testifies in open court in the presence of Jeffery Steven Marx, that she will—the result would cause further serious emotional and physical distress than what she has now?
>
> A. If no one was ugly to her, you know, made her feel really badly about it—I think Jennifer is more of a talker than most. She will probably come on and do it.
>
> Q. Of course, we can make her do that as you well know, but my concern is what would be the emotional and physical distress that would cause—that would be resulting from her testifying in open court in the presence of another.
>
> A. In the presence of Jeffrey?
>
> Q. Yes, ma'am.
>
> A. She tells me she wants to. So unless she gets more frightened than I ex-

pect, that little girl would probably testify okay.

Even under direct questioning from the trial judge the expert opined that the child witness was "a very strong little girl . . . who wants to tell her story." Finally, the trial court asked the expert the ultimate question:

THE COURT: Do you think that there would be any emotional or physical problems with her confronting—testifying from that witness stand and having to confront [appellant]?

THE WITNESS: Your Honor, I couldn't say for sure that there would not be. *I wouldn't expect it.*

(Emphasis added.)

In my opinion, even after according due deference to the trial court, this testimony does not come close to meeting the *Gonzales* standards.

In addition, I am concerned about the presumption of innocence implications of the trial court's action. Anytime a trial court deviates from normal courtroom procedure, it runs the risk that the jury will place the spotlight of blame upon the accused. If the presumption is that the appellant is innocent, a jury cannot help but wonder why the child witnesses are testifying outside the courtroom, closeted away from the ostensibly innocent defendant. Instructions to the jury are notoriously ineffective to prevent prejudice in this type of situation.

Additionally, while I am mindful that, as an intermediate appellate court, we are bound to follow *Gonzales*, I cannot help but observe the consequences of the *Gonzales* decision. The United States Supreme Court in *Craig* permitted a confrontational exception based upon a Maryland statute that set out particularized facts which invoked the statute as well as specific procedures to be followed thereafter. Likewise, Texas has such a statute to be followed in a specific class of cases. *See* Tex.Code Crim. Proc. Ann. art. 38.071 (West Supp.1997). The problem in *Gonzales*, which is also present here, is that the statute is inoperative because the child witnesses do not come within the purview of the legislative enactment. In *Gonzales*, the criminal offense was murder while the statute is limited to sex crimes involving children. In the instant cause, while the criminal offense fits the statute, the child witnesses do not. The complainant is thirteen years old while the statute is limited to those twelve and under. And, the six-year-old child witness is not the victim of the criminal offense as required by the statute but rather is a complainant in an extraneous criminal offense.

Faced with the inability to utilize the statute as evidence of Texas legislative policy, the court of criminal appeals in *Gonzales* allowed trial judges on a case-by-case basis to provide the compelling state interest sufficient to override a defendant's constitutional right to confront witnesses. This permits, in my opinion, the exception to swallow the rule. The district courts of this state are allowed to make these decisions on an *ad hoc* basis subject to appellate review only under an abuse of discretion standard. The *Gonzales* test appears to me to create the specter of nonuniform and inconsistent public policy depending on the geographic area of the state and the particular trial judge involved in the case. This phenomenon is particularly troubling in the sensitive area of a defendant's right to a fair trial with all its constitutional due process implications.

For all of the foregoing reasons, I conclude that the trial court erred when it permitted the nonvictim child witness to testify outside the presence of the appellant and the jury. However, I concur in the result reached by the majority because I regard the error as harmless beyond a reasonable doubt. Tex. R.App. P. 81(b)(2).

Evidence against the appellant consisted of his voluntary confession, the testimony of the complainant, and testimony of other corroborative witnesses including that of the six-year-old child witness in question. In his confession, the appellant voluntarily admits engaging in sexual intercourse with the complainant which forms the basis for the jury's verdict of guilt. A review of the child witness's testimony reveals that she testified to having observed, through the window, the appellant and the complainant engaging in sex. The child's testimony, though brief, is filled with contradictions and overly detailed

descriptions of other persons present who witnessed the same sexual conduct who were either unavailable to the prosecution or would not verify the child's story.

In sum, it is open to question whether the testimony of this child witness helped or hurt the prosecution. At best, it provided minimal corroboration of criminal conduct to which the appellant had already confessed. At worst, it provided the defense with considerable ammunition to challenge the prosecution's case. Therefore, I conclude that, although the trial court erred in permitting the nonvictim witness to testify by closed-circuit television, it played no part in the appellant's conviction.

In conclusion, these cases always present compelling and egregious fact situations. No judge can be unsympathetic to cases involving sexual abuse of child victims. However, I believe we must resist the temptation to bend immutable constitutional principles in order to protect society's young. I fear the majority has pushed this delicate balance too far in that direction.

Albert Ray RODRIGUEZ, Appellant,

v.

The STATE of Texas, Appellee.

No. 03-95-00742-CR.

Court of Appeals of Texas, Austin.

July 3, 1997.

Discretionary Review Refused Dec. 18, 1997.

Defendant was convicted in the 331st Judicial District Court, Travis County, Bob Perkins, J., of felony-murder. Defendant appealed. The Court of Appeals, John F. Onion, Jr., J. (Retired), held that: (1) merger doctrine is inapplicable to felony-murder, and (2) defendant committed felony-murder by repeatedly shooting firearm into automobile known to be occupied.

Affirmed.

1. Homicide ⇐18(1)

Merger doctrine that underlying felony must be independent of homicide does not apply to felony-murder. V.T.C.A., Penal Code § 19.02(b)(3).

2. Constitutional Law ⇐50

Power which has been granted to one department of government by State Constitution may be exercised only by that branch to exclusion of others; any attempt by one department to interfere with powers of another is null and void.

3. Constitutional Law ⇐70.1(2)

Legislature is constitutionally entitled to expect that judiciary will faithfully follow specific text that was adopted.

4. Statutes ⇐188

If meaning of statutory text, when read using established canons of statutory construction relating to such text, should have been plain to legislators who voted on it, courts will ordinarily give effect to that plain meaning. V.T.C.A., Government Code § 311.011(a).

5. Statutes ⇐189

Where application of plain meaning rule for interpreting statute would lead to absurd consequences that legislature could not possibly have intended, courts should not apply language literally.

6. Homicide ⇐18(1)

Under maxim expresio unius est exclusio alterius, including limitation that manslaughter cannot be basis for felony-murder excludes all other limitations such as merger doctrine requiring underlying felony to be independent of the homicide. V.T.C.A., Penal Code § 19.02(b)(3).

7. Homicide ⇐18(1)

Legislature, within its constitutional role, remains free to abolish felony-murder or limit its application or effect to other felonies. V.T.C.A., Penal Code § 19.02(b).

APPENDIX "C"

THE CONSTITUTION OF THE UNITED STATES

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives i Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature,

or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

JEFFREY STEVEN MARX,

Petitioner

v.

STATE OF TEXAS,

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

F. N. "TREY" BROWN III
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Facsimile: (512) 756-2933

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW, F. N. "TREY" BROWN III, and would respectfully request that JEFFREY STEVEN MARX, Petitioner in this cause, be allowed to proceed in forma pauperis and in support of such motion would show this Honorable Supreme Court as follows:

I.

I, the undersigned, am the court-appointed attorney for JEFFREY STEVEN MARX, Petitioner in this cause. Said counsel represented JEFFREY STEVEN MARX in the 33rd Judicial District Trial Court, in the Third Court of Appeals in Austin, and in The Texas Court of Criminal Appeals. At the time of the appointment, JEFFREY STEVEN MARX, had been incarcerated and was not employed, and since the time of his conviction, has been incarcerated in the Texas Department of Criminal Justice, Huntsville, Texas. JEFFREY STEVEN MARX is indigent and has no means by which to obtain counsel.

WHEREFORE, PREMISES CONSIDERED, counsel for Petitioner respectfully requests that the Court grant this Motion for Leave to Proceed In Forma Pauperis.

Respectfully submitted:

LAW OFFICES OF MOCK & BROWN
Attorneys at Law
205 South Pierce
Burnet, Texas 78611
Phone: (512) 756-2931
Fax: (512) 756-2933

F. N. "TREY" BROWN III
State Bar No. 00783728

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Motion for Leave to Proceed In Forma Pauperis has been mailed to the following persons by certified mail, return receipt requested on this 28th day of April, 1999:

Honorable Sam Oatman
District Attorney
P. O. Box 725
Llano, Texas 78643

The Honorable Matthew W. Paul
State Prosecuting Attorney
P. O. Box 12405
Austin, Texas 78711

F. N. "TREY" BROWN III

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

JEFFREY STEVEN MARX,

Petitioner

v.

STATE OF TEXAS,

Respondent

PAUPER'S OATH

TO THE TEXAS COURT OF CRIMINAL APPEALS

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AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Jeffrey Steven Marx being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes---- (No-X--)
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary or wages per month which you received.
   August, 1994, minimum wage.

2. Have you received within the past twelve months any income from business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources?
   Yes---- (No --X--)
   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes ---- (No --X--)
   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ---- (No --X--)
   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.
   Lisa Marx, Mickie Marx, Wonda Marx, daughters.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 6-23-98

/s/ Jeffrey Marx

LULISA NANCE
Notary Public
STATE OF TEXAS
My Commission Expires 10/20/2002

SUBSCRIBED AND SWORN TO BEFORE ME BY THE SAID JEFFREY MARX on 23rd day of June, 1999.

Lulisa Nance
NOTARY PUBLIC

ORIGINAL

Supreme Court, U.S.
FILED
AUG 4 1999
CLERK

No. 98-9183

In the
Supreme Court of the United States

JEFFREY S. MARX,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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ANDY TAYLOR
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ATTORNEYS FOR RESPONDENT

RECEIVED
AUG 9 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTIONS PRESENTED FOR REVIEW

1. Whether application of TEX. CODE CRIM. PROC. ANN. art. 38.071 to Marx's trial violated his rights under the Confrontation Clause because the evidence failed to show that use of the closed-circuit television was necessary to protect the non-victim child witness from further emotional trauma.

2. Whether TEX. CODE CRIM. PROC. ANN. art. 38.071 is facially unconstitutional because the use of closed-circuit testimony violated Marx's right to be presumed innocent.

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No. 98-9183

In the

Supreme Court of the United States

JEFFREY S. MARX,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the State of Texas, submits this brief in opposition to Jeffrey S. Marx's petition for writ of certiorari. In his petition, Marx asks the Court to review the decision of the Texas Court of Criminal Appeals, affirming his conviction for aggravated sexual assault. *Marx v. State*, 987 S.W.2d 577 (Tex. Crim. App. 1999). Specifically, Marx attacks the lower court's holding allowing a non-victim child witness to testify through a closed-circuit television and concluding that the use of closed-circuit testimony does not violate his presumption of innocence.

Marx contends that it was constitutional error to allow the testimony of a non-victim child witness via closed-circuit television because the procedure was necessary to protect the non-victim child witness from further trauma. *See* Pet. at 7-10. Concerning the alleged violation, the Texas Court of Criminal Appeals employed precisely the same legal standard that this Court established in *Maryland v. Craig*, 497 U.S. 836 (1990). *Marx*, 987 S.W.2d

at 580. The Court should deny Marx's petition because the court of criminal appeals's decision does not conflict with relevant decisions of this Court or decisions of the United States courts of appeals. *See* SUP. CT. R. 10(b), (c).

Furthermore, Marx's argument that the evidence failed to support the trial court's decision to allow the non-victim child witness to testify via closed-circuit television is fact bound. This argument necessarily requires a review of the evidence supporting the trial court's decision. The Court should decline Marx's invitation to review the evidence and discuss specific facts. *United States v. Johnston* 268 U.S. 220, 227 (1925); *Southern Power Co. v. North Carolina Pub. Serv. Co.*, 263 U.S. 508, 509 (1924). Marx's reliance on *Danner v. Kentucky*, 119 S.Ct. 529 (1998), is unavailing. Pet. at 8-10. The denial of certiorari in *Danner* simply demonstrates that the Court does not review cases that are fact bound. The purely factual nature of Marx's argument strongly suggests that the petition for writ of certiorari should be denied.

If the admission of the non-victim's testimony via closed-circuit television resulted in a constitutional violation, it was harmless error beyond a reasonable doubt.

Judicial restraint requires the Court to avoid unnecessary resolution of constitutional issues. *Ashwander v. TWA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring). The Court has consistently adhered to the principle that it will not address a constitutional question unless it is necessary to the resolution of the case before the court. *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974). Marx's argument that article 38.071 was used to allow the testimony of the child witness is false because the court of criminal appeals

expressly found that the use of closed-circuit television was allowed by precedent other than article 38.071. *Marx*, 987 S.W.2d at 583. Logically, if article 38.071 did not serve as the basis for allowing the testimony, then Marx's attack on the constitutionality of the statute does not affect the validity of his conviction. The Court has long recognized that it has no power to render advisory opinions. *Ashwander*, 297 U.S. at 346-47. Because article 38.071 was not the basis for allowing the child witness's testimony, the Court's resolution of the issues would be advisory, thus certiorari should be denied.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Marx was charged with three counts of aggravated sexual assault of a child. Tr 1.[1] He pleaded "not guilty" and was tried by a jury, which on April 24, 1995, found him guilty of Count I and not guilty of Counts 2 and 3. Tr 114-16. Following a separate punishment hearing, the jury assessed punishment of imprisonment for twenty-three years. Tr 121.

Marx's conviction was affirmed by the Third Court of Appeals of Texas on July 3, 1997. *Marx v. State*, 953 S.W.2d 321 (Tex. App.—Austin 1997, pet. granted). Thereafter, the Court of Criminal Appeals granted Marx's petition for discretionary review and affirmed the judgment of the court of appeals. *Marx v. State*, 987 S.W.2d 577 (Tex. Crim. App. 1999).

---

[1] "Tr" refers to the transcript of papers filed with the court prior to and during Marx's trial, followed by page number. "SR" refers to the state record of transcribed trial proceedings, preceded by volume number and followed by page number.

B. Statement of Facts

The relevant facts are set out in the opinion of the court below:

> In August 1994, a Burnet County grand jury indicted [Marx] on three counts of aggravated sexual assault of a child. *See* TEX. PENAL CODE ANN. §22.021(a)(1)(B)(i) & (2)(B). The named victim in each count was a thirteen-year-old girl, B. J. In April 1995, shortly before the case went to trial in the 33rd District Court of Burnet County, the State filed written motions in that court asking that B. J. and another girl, six-year-old J. M., an alleged witness to the offenses, be allowed to testify via two-way closed circuit television, outside [Marx's] presence. The State argued in the motions that the two girls, "if forced to testify in the presence and sight of the defendant, would suffer serious emotional and physical distress." The State argued further that the girls' closed circuit television testimony would be admissible under the Sixth Amendment, as interpreted in *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L. Ed.2d 666 (1990), and Article 38.071.[2]
>
> The District Court held a pretrial hearing on the State's motions, at which hearing four witnesses testified. Pat Fluitt, B. J.'s teacher at Burnet Middle School, testified that B. J. had "learning disabilities" and read at a six-year-old's level. She testified further that B. J. had been "dreading" the possibility of testifying in [Marx's] presence and had "cried a couple of times" about it in class. Fluitt also testified that B. J. was "quite fearful" and that requiring her to testify in [Marx's] presence "would be a traumatic situation" for her.
>
> Barney Raines, B. J.'s grandfather, testified that B. J. was "sixty percent" mentally retarded. He also testified that she had "shown fear" and had told him that [Marx] had threatened her. Raines testified further that he believed B. J. would suffer emotionally and perhaps physically if required to testify in [Marx's] presence.
>
> Crystal Hayden, J. M.'s mother, testified that J. M. was afraid of [Marx] but was nevertheless ready to testify in his presence. Hayden also

---

[2] Article 38.071 provides that, in certain specified circumstances, a child witness' testimony may be taken via videotape or closed circuit television, outside the defendant's presence. *See generally* 3 F. Maloney (ed.), *et al.*, TEXAS CRIMINAL PRACTICE GUIDE §73B.02[5][d] (1997).

testified, however, that J. M. was "real scared" and that she would probably be traumatized if required to testify in [Marx's] presence, even if her testimony related only to what [Marx] had done to B. J..

Finally, Dr. Anita Calvert, a licensed mental health therapist, testified that she had been counseling J. M. for an extended period of time because of [Marx's] many sexual assaults on her. Calvert testified further that J. M. was a "wreck," that she had had nightmares, and that she had suffered serious psychological damage, all because of what [Marx] had done to her. Calvert also testified that J. M. had demonstrated "extreme sexual knowledge" and had "inappropriately advanced males in [Calvert's] office," again because of what [Marx] had done to her. Finally, Calvert testified that, although J. M. was "a very strong little girl" and "would probably testify okay" in [Marx's] presence, she could not be certain of that.

[Marx] objected to the used of closed circuit television testimony on both constitutional and statutory grounds. He argued first that use of such testimony would deny him his Sixth Amendment right to confront the witnesses against him. He argued second that the use of such testimony would violate Article 38.071 "because [that statute] applies only to a victim of the offense for which the defendant is on trial, and the victim of that offense [must be] under [thirteen] years of age." [Marx] pointed out that B. J. was thirteen years old that and that J. M. was not the alleged victim of the offense for which he was being tried.

At the conclusion of the hearing, the District Court found, as a matter of fact, that both B. J. and J. M. "would be traumatized by being required to testify in the defendant's presence" and that "the emotional distress . . . would be more than a minimum." The court then rejected [Marx's] legal arguments without explanation and granted the State's motions for closed circuit testimony.

Shortly before B. J. and J. M. testified at the guilt/innocence stage of trial, [Marx] reiterated his previous objections to the use of closed circuit testimony and also argued, for the first time, that use of such testimony would impair his Fourteenth Amendment right to the presumption of innocence "because for a child to be presumed to be harmed [by testifying in his presence], then [one must] presume that this offense did, in fact, occur." The District Court rejected all of [Marx's] arguments, however, and, shortly thereafter, instructed the jury as follows:

> Ladies and gentlemen, I'm going to give you an instruction at this time. Our statutes provide that the testimony of children in these types of cases can be taken by what we call closed circuit television, and that is what's going to be taking place here for the next couple of witnesses. So we'll be seeing the witness on the closed circuit television, and [the attorneys] will be asking the witness questions from the podium there so that [the witness] can see the person who is asking the questions, and so forth. The rest of the procedure will go according to the Code of Criminal Procedure as we are bound by it, at any rate, and that will be the only change insofar as the testimony is concerned.
>
> B. J. and J. M. then testified via two-way closed circuit television. The jury convicted [Marx] of one count of aggravated sexual assault and assessed his punishment at imprisonment for 23 years.

Marx, 987 S.W.2d at 578-80.

ARGUMENT

I. THE QUESTIONS PRESENTED ARE NOT IN CONFLICT WITH ANY OTHER DECISION AND DO NOT PRESENT AN IMPORTANT QUESTION THAT SHOULD BE DECIDED BY THE COURT.

Rule 10 provides for discretionary review when a decision of the state's highest court is in conflict with decisions of other states' highest courts or a United States court of appeals. As aptly stated by the state court of appeals, the issue presented, whether the testimony of a non-victim child witness by closed circuit television violates the Confrontation Clause, is an issue of first impression. *Marx*, 953 S.W.2d at 321. There are no decisions of another state's highest court or a United States court of appeals addressing the issue. Indeed, Marx does not argue that there is a conflict but rather that the Court should review this case to re-define its holding in *Maryland v. Craig*. Pet. at 8 ("This writ should be granted in order for

the Supreme Court to reexamine its holding in *Maryland v. Craig*, and for the Supreme Court to examine how far they are going to allow that holding to be expanded."). Because Marx does not even allege a split of authority, the petition should be denied.

The Court has held that the Confrontation Clause "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988). The right is not absolute, however, and must accommodate the state's "compelling" interest in "the protection of minor victims of sex crimes from further trauma and embarrassment." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). Accordingly, in *Maryland v. Craig*, the Court found "where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure [which] preserves the essence of effective confrontation." 497 U.S. at 857.

The *Craig* Court addressed whether the Confrontation Clause was violated by allowing a child witness in a child abuse case to testify at trial outside of the defendant's presence through the use of one-way closed circuit television. The Court held that "the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant." *Id.* at 855.

In addition to *Craig*, other courts have regularly recognized the need to protect the physical and psychological well-being of child abuse victims in judicial proceedings, and a variety of measures have been used to alleviate the harsh consequences associated with child abuse cases. *See, e.g.*, *United States v. Carrier*, 9 F.3d 867, 869 (CA10 1993) (child testified over two-way closed circuit television in the presence of the attorneys), *cert. denied sub nom. Carrier v. United States*, 511 U.S. 1044 (1994); *United States v. Garcia*, 7 F.3d 885, 887 (CA9 1993) (child testified over two-way closed circuit television outside the presence of the defendant); *Thomas v. Gunter*, 962 F.2d 1477, 1480 (CA10 1992) (child videotaped at treatment center in the presence of her therapist and an investigator selected by the defendant); *Spigarolo v. Meachum*, 934 F.2d 19, 21 (CA2 1991) (child videotaped in the presence of the attorneys and judge); *Arcaris v. Superior Court*, 774 P.2d 837, 839 (Ariz. Ct. App. 1989) (mother allowed to be present during child's deposition); *Otteson v. District Court*, 443 N.W.2d 726, 727 (Iowa Ct. App. 1989) (defendant separated from child by one-way mirror).

Also following the factors established in *Maryland v. Craig*, a few courts have addressed whether closed-circuit television testimony of child witnesses who were not victims of sexual abuse violates Confrontation Clause principles. In *State v. Ford*, 626 So.2d 1338, 1345 (Fla. 1993), the Florida Supreme Court considered whether the videotaped testimony of a child witness was allowed in a murder prosecution. *Id.* 1344-45. Although the specific facts in the case before the court constituted error, the Florida Supreme Court noted that a court's "inherent powers to do all things that are reasonable and necessary for

the administration of justice" included protecting witnesses; thus, the trial court could properly allow the testimony of child witnesses using this procedure. *Id.* The Florida Court found that the factors in *Maryland v. Craig* must be satisfied to avoid offending the Confrontation Clause. *Id.*

Similarly, the Texas Court of Criminal Appeals found that the testimony of a child witness by closed circuit television in a murder prosecution did not violate the Confrontation Clause. *Gonzales v. State*, 818 S.W.2d 756, 766 (Tex. Crim. App. 1991). The Texas Court of Criminal Appeals specifically noted that *Craig* did not foreclose the testimony of a child witness who was not the victim. 818 S.W.2d at 764-66 (concluding that allowing a child to testify by closed-circuit television, even without express statutory authorization, did not violate defendant's Sixth Amendment right).

Whether a non-victim child witness may testify through a closed-circuit television is not a question left open by the Court's decision in *Maryland v. Craig*, but even if it was, there is no conflict in the decisions of the courts. Because the issue is not immediate and compelling, the Court can postpone consideration of the question until it is squarely presented and there is disagreement among the lower courts. In Marx's case, it is important to note that the non-victim child witness was herself allegedly a victim of sexual abuse by Marx. *Marx*, 987 S.W.2d at 584 (Holland, J., concurring and dissenting) ("the State established that J.M., [the non-victim witness], had suffered emotional harm due to prior sexual offenses allegedly comitted by [Marx] and was frightened by him"). Although the non-victim witness was not the named complainant in the indictment for which Marx was

on trial, she in fact was alleged to be his "victim" in another indictment that had not yet proceeded to trial. For these reasons, this is not the appropriate case for the Court to decide whether the rule of *Maryland v. Craig* should extend to non-victim witnesses.

Further, the issues in this case involve only the application of established constitutional principles to the facts. Thus, the petition presents no important question of law to justify this Court's exercise of its certiorari jurisdiction. Accordingly, because there is no conflict between the court below's decision and the relevant decisions of this Court concerning whether a Confrontation Clause violation occurred as an initial matter, *See* SUP. CT. R. 10(c), Marx's petition should be denied.

II. THE PETITION SHOULD BE DENIED BECAUSE THE COURT DOES NOT GRANT CERTIORARI TO REVIEW THE STATE COURTS' FACTUAL FINDINGS.

Marx asks the Court to review the record evidence and find that allowing the non-victim child witness's testimony via closed-circuit television violated his constitutional rights. Pet. at 7-8. Even if Marx's petition is found to encompass issues broader than the constitutionality of the statute, review nonetheless is not warranted because no important question of law is presented. There can be no doubt that the court below applied the correct standard of *Maryland v. Craig*, 497 U.S. 836 (1990), in deciding the constitutional issues before it, and the only real point of contention is the adequacy of the state trial court's fact findings that the child witnesses would be traumatized if forced to testify in Marx's presence. Five judges found that the requirements of *Maryland v. Craig* were satisfied with regard to both child witnesses who testified via closed circuit television, while four found that only

one of the two witnesses was so traumatized as to justify use of the procedure. Marx does not, because he cannot, argue that the Texas court applied the wrong constitutional standard,[3] and instead merely asks this Court to reevaluate whether the record supports the trial court's findings.

This is precisely the sort of factual inquiry that the Court traditionally has found insufficient to justify exercise of its certiorari jurisdiction. *See, e.g., Johnston,* 268 U.S. at 227 ("We do not grant certiorari to review evidence and discuss specific facts."). This is particularly so in the instant case, where the state trial court's findings have received the imprimatur of both the state court of appeals and the Court of Criminal Appeals, because this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949); *see also Goodman v. Lukens Steel Co.*, 482 U.S. 556, 565 (1987) ("both courts having agreed on the facts, we are not inclined to examine the record for ourselves absent some extraordinary reasons for undertaking this task"). As discussed in section III, *infra,* any constitutional violation in the use of closed-circuit television at Marx's trial was harmless error beyond a reasonable doubt. This case does not present an extraordinary error, and therefore, review of the state courts' fact findings is unwarranted.

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[3] Marx does argue that the rule of *Maryland v. Craig* should not extend to non-victim witnesses. Although he correctly asserts that this specific issue has not been decided, this is not the appropriate case in which to do so. *See* discussion part I, *supra.*

Moreover, the difficulties inherent in making factual determinations from a cold record caution against such an undertaking. Neither this Court nor the court below is as well situated as the trial court to judge whether the witness's emotional state justified the use of closed circuit television at Marx's trial.

> Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses.

Marshall v. Lonberger, 459 U.S. 422, 434 (1983).

Since *Maryland v. Craig* was decided, the federal courts of appeals have had numerous opportunities to decide whether its teachings (and partial codification in 18 U.S.C. §3509(b)(1)(B)) were correctly applied to a particular factual situation and have reached different conclusions based on the records before them.[4] There is nothing remarkable about this case that renders it any more worthy of review. Reevaluation of the adequacy of the state courts' findings at Marx's trial is warranted only if this Court is prepared to function as an error-correction court, which it manifestly is not. *See, e.g., Calderon v. Thompson*, 118

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[4] *E.g., United States v. Moses*, 137 F.3d 894, 898-99 (CA6 1998) (district court clearly erred in finding that child witness would be traumatized if forced to testify in defendant's presence when she repeatedly stated that she was not afraid of him); *Fields v. Murray*, 49 F.3d 1024, 1036 (CA4) (en banc) (upholding refusal to allow defendant to proceed *pro se* at trial and cross-examine child witnesses in sex abuse case), *cert. denied sub nom. Fields v. Angelone*, 516 U.S. 884 (1995); *United States v. Carrier*, 9 F.3d at 870-71 (upholding use of closed circuit television where record supported trial court's findings that child witnesses would suffer trauma from testifying in defendant's presence); *Hoversten v. State of Iowa*, 998 F.2d 614, 616 (CA8 1993) (use of one-way mirror not justified where district court found only that child would be traumatized by testifying in courtroom generally rather than in defendant's presence).

S.Ct. 1489, 1507 (1998) (Souter, J., dissenting) ("It is . . . axiomatic that this Court cannot devote itself to error correction . . . .").

III. THE COURT SHOULD NOT GRANT CERTIORARI TO REVIEW ALLEGED ERROR THAT WAS HARMLESS BEYOND A REASONABLE DOUBT.

Because the Court of Criminal Appeals upheld the procedure employed by the trial court, it did not reach the issue of harmless error. If there was error of constitutional dimension, however, it surely was harmless in light of the entire record of Marx's trial.

Whether Confrontation Clause error in a particular case may properly be deemed harmless beyond a reasonable doubt depends on "a host of factors," including

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).

Of the three judges who decided Marx's appeal in the state court of appeals, one believed that the Confrontation Clause was violated but that any error was harmless beyond a reasonable doubt. *Marx*, 953 S.W.2d at 341 (Kidd, J., concurring).

> Evidence against [Marx] consisted of his voluntary confession, the testimony of the complainant, and testimony of other corroborative witnesses including the six-year-old child witness in question. In his confession, [Marx] voluntarily admits engaging in sexual intercourse with the complainant which forms the basis for the jury's verdict of guilt. A review of the child witness's testimony reveals that she testified to having observed, through the window, [Marx] and the complainant engaging in sex. The child's testimony, though brief, is filled with contradictions and overly detailed descriptions of other persons present who were either unavailable to the prosecution or would not verify the child's story.

> In sum, it is open to question whether the testimony of the child witness helped or hurt the prosecution. At best, it provided minimal corroboration of criminal conduct to which [Marx] had already confessed. At worst, it provided the defense with considerable ammunition to challenge the prosecution's case. Therefore, I conclude that, although the trial court erred in permitting the nonvictim witnesses to testify by closed-circuit television, it played no part in [Marx's] conviction.

Id. at 341-42.

This conclusion is unassailably correct. In addition to the factors cited by Judge Kidd, it should be noted that Marx did not testify or offer any evidence of alibi or any other reason to believe that he did not commit the acts to which he had confessed. Three witnesses testified on Marx's behalf at the guilt-innocence phase of trial: his brother, Winfred Wayne ("Wayne") Marx,[5] 4SR 538 *et seq.*; his mother, Connie Marx, 4 SR 571 *et seq.*; and Wayne's former girlfriend, Louise Bonnett. 4 SR 576 *et seq.* Wayne Marx had been present at the outing at which the offense occurred, but had no personal knowledge of facts that were sufficient to rebut the testimony of the state's witnesses. Instead, he testified that "I don't believe it happened. There's no way it could have." 4 SR 560. Connie Marx admitted that she had not been present and had no knowledge of what took place other than what Marx had told her. 4 SR 574. Although Bonnett had been present, her testimony, like that of Wayne Marx, was limited to what she had observed and, even if believed,[6] was insufficient to

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[5] Wayne Marx is the father of J. M. 4 SR 538.

[6] Bonnett's testimony was anything but believable. Although she did not remember the date on which the events in question occurred, 4 SR 577, she did remember that she had been wearing a pink blouse and jeans and that Wayne Marx had been wearing a blue shirt and jeans. 4 SR 582. Yet, she didn't recall what items of clothing Wayne wore the following weekend. *Id.*

exculpate Marx.

In sum, the prosecution's case was overwhelming. J. M.'s testimony was relatively unimportant and was corroborated by the testimony of other witnesses and by Marx's confession, "probably the most probative and damaging evidence that can be admitted against him." *Bruton v. United States*, 391 U.S. 123, 139 (1968) (White, J., dissenting). On this record, any confrontation violation surely was harmless. *Cf. Olden v. Kentucky*, 488 U.S. 227, 233 (1988) (error not harmless where witness's testimony was "crucial" to the state's case, was directly contradicted by testimony of other witnesses and only slightly corroborated, and the state's case against the defendant "was far from overwhelming"). This Court should not expend its resources to correct an alleged error that had no effect on the lower court's judgment.

IV. THE PETITION SHOULD BE DENIED BECAUSE THE COURT DOES NOT GRANT CERTIORARI TO ISSUE ADVISORY OPINIONS.

Marx's petition presents nothing for review by this Court because, regardless how the questions presented are decided, they cannot affect the judgment of the court below. The Court of Criminal Appeals granted review to decide whether the state court of appeals had correctly decided "the constitutional and statutory arguments discussed previously." *Marx*, 987 S.W.2d at 580. Those arguments were that the use of closed-circuit television testimony at his trial (1) violated the Confrontation Clause of the Sixth Amendment, (2) violated Article 38.071 of the Texas Code of Criminal Procedure, and (3) impaired his Fourteenth Amendment presumption of innocence. *Id.* at 579. The Court of Criminal Appeals held that

the use of closed-circuit television testimony in Marx's case was constitutionally permissible even though not authorized by article 38.071. *Marx*, 987 S.W.2d at 582-83. Because the testimony was admissible as a matter of federal constitutional law, the court reasoned, it could not be excluded pursuant to the more stringent requirements of the statute: "We hold, therefore, that Article 38.071did not prohibit the admission of the closed circuit television testimony of B. J. and J. M." *Id.* at 583.[7]

Now, in this Court, Marx reurges two of the questions that were presented to the court below: (1) whether article 38.071, as applied at his trial, violated the Confrontation Clause, and (2) whether article 38.071 is facially unconstitutional in denying him the presumption of innocence. Pet. at i. Inasmuch as the Texas Court of Criminal Appeals specifically disavowed reliance on Article 38.071 in upholding the use of closed-circuit television at Marx's trial, the constitutionality of the statute is not at issue, and the questions presented in Marx's petition are a *non sequitur*. In other words, regardless whether article 38.071 is found to be constitutional, the judgment of the court below will not be affected, because it did not rely on the statute.

The Court should not expend its resources to issue an advisory opinion, which has been "disapproved by this Court from the beginning." *Steel Co. v. Citizens for a Better*

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[7] *See also id.* (Holland, J., concurring and dissenting) ("I agree with the majority that Article 38.071 of the Code of Criminal Procedure is not the exclusive authority permitting the use of closed-circuit television for the testimony of a child in Texas"); *id.* at 586 (Keller, J., dissenting) ("I agree with the majority's assessment that Article 38.071 does not preclude the procedure employed in the present case").

Environment, 118 S.Ct. 1003, 1016 (1998) (citing *Muskrat v. United States*, 219 U.S. 346, 362 (1911) and *Hayburn's Case*, 2 Dall. 409 (1792)). This is especially so where, as here, the opinion is "with regard to a constitutional question, as to which we seek to avoid even non advisory opinions." *City of Chicago v. Morales*, 119 S.Ct. 1849, 1869 (1999) (Breyer, J., concurring in part and concurring in the judgment) (citing *Ashwander*, 297 U.S. at 347).

V. THE PETITION SHOULD BE DENIED BECAUSE THE USE OF CLOSED CIRCUIT TELEVISION DID NOT IMPAIR MARX'S PRESUMPTION OF INNOCENCE.

Finally, Marx argues that the use of closed circuit television at his trial impaired his presumption of innocence by suggesting that the child witnesses were afraid of him because he in fact was guilty of the offenses with which he was charged. Pet. at 10-12. Because the court below's resolution of this issue was fully consistent with this Court's precedents, further review is unwarranted.

Whether a particular practice works to impair a defendant's constitutional presumption of innocence must be determined by whether "an unacceptable risk is presented of impermissible factors coming into play." *Estelle v. Williams*, 425 U.S. 501, 505 (1976). "[I]f the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over." *Holbrook v. Flynn*, 475 U.S. 560, 572 (1986). The Court of Criminal Appeals correctly applied this standard, noting that where "the challenged practice need not be interpreted by jurors as a sign that the defendant is particularly dangerous or culpable, it is not inherently prejudicial and does not deny due process." *Marx*, 987 S.W.2d at 581. The court found that no stigma attached to Marx

personally because the trial court instructed the jury that "the closed circuit television procedure about to be employed was authorized by statue 'in these types of cases.'" *Id.* In addition, the trial court instructed the jury on the presumption of innocence to be applied to Marx. Tr. 111.

Juries are strongly presumed to follow their instructions. *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). When this venerable presumption is applied to the cautionary instruction that Marx's jury received, there is no reasonable basis to believe that the jury drew an impermissible inference from the use of closed-circuit television at his trial. Marx fails to show actual prejudice, and his self-serving speculation that the presumption of innocence was impaired is not an adequate ground for review.

CONCLUSION

For the reasons stated, Respondent respectfully requests that Marx's petition for writ of certiorari be denied.

Respectfully submitted,

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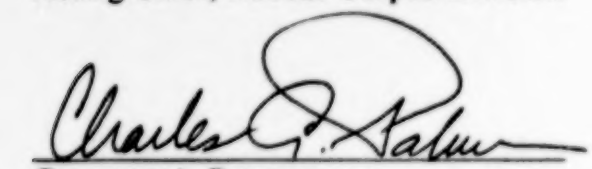

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August 4, 1999

Honorable William K. Suter, Clerk
United States Supreme Court
Office of the Clerk
1 First St., N.E.
Washington, D.C. 20543

Re: *Jeffrey S. Marx v. The State of Texas*
No. 98-9183

Dear Mr. Suter:

Enclosed for filing with the papers in the above styled cause are the original and nine (9) copies of Respondent's Brief in Opposition. Also enclosed is the Proof of Service form. Please indicate the date of filing on the enclosed copy of this letter and return it to me in the enclosed postpaid addressed envelope.

By copy of this letter, I am forwarding a copy of this brief to Petitioner's counsel.

Thank you for your kind assistance in this matter.

Yours truly,

CHARLES A. PALMER
Assistant Attorney General
(512) 936-1400

CAP:cc
Enclosure
c: F.N. "Trey" Brown, III
Law Office of Mock & Brown
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No. 98-9183

In the
Supreme Court of the United States

JEFFREY S. MARX,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Texas Court of Criminal Appeals

PROOF OF SERVICE

I hereby certify that on the 4th day of August, 1999, two copies of Respondent's Brief in Opposition was mailed, postage prepaid, to F.N. "Trey" Brown, III, Law Office of Mock & Brown, 205 South Pierce, Burnet, Texas 78611. All parties required to be served have been served. I am a member of the Bar of this Court.

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SUPREME COURT OF THE UNITED STATES

JEFFREY STEVEN MARX, PETITIONER *v.* TEXAS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 98–9183. Decided November 29, 1999

The petition for a writ of certiorari is denied.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting from the denial of certiorari.

The Court today forgoes the opportunity to prevent an expansion of the exception it recently created to the Sixth Amendment right of the defendant "[i]n all criminal prosecutions . . . to be confronted with the witnesses against him." In *Maryland* v. *Craig*, 497 U. S. 836 (1990), the Court held for the first time that the right "to be confronted" with a trial witness does not necessarily require that the witness testify in the defendant's presence. It said that (a) as to the category of witnesses involved in that case, and (b) after the preliminary trial-court finding that the statute in that case required, the State could restrict the defendant to viewing the trial testimony over closed-circuit television. The witnesses at issue were the alleged child victim in a sexual abuse case, and other child victims testifying concerning *their own abuse*. The preliminary finding required was that testifying in the defendant's presence would cause the child serious emotional trauma. *Id.*, at 840–841.

I dissented in *Craig*, because I thought it subordinated the plain language of the Bill of Rights to the "tide of prevailing current opinion." *Id.*, at 860. See also *Danner* v. *Kentucky*, 525 U. S. 1010 (1998) (SCALIA, J., dissenting from denial of certiorari). I do not think the Court should ever depart from the plain meaning of the Bill of Rights. But when it does take such a step into the dark it has an

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obligation, it seems to me, to clarify as soon as possible the extent of its permitted departure. The present case represents an expansion of *Craig* both as to the category of witness covered and as to the finding required. First, it extends the holding of that case to a child witness whose abuse is neither the subject of the prosecution nor will be the subject of her testimony. The only basis for excusing her from real confrontation with the defendant is that, according to the prosecution, she also was the subject of sexual abuse, on another occasion, by the same defendant. The State's extension of our novel confrontation-via-TV jurisprudence to this situation should alone warrant our accepting this case for review.

But the case expands *Craig* even further with regard to the preliminary finding. The state statute at issue in *Craig* permitted confrontation-via-TV only when the trial court found that real confrontation would produce "'serious emotional distress such that the child cannot reasonably communicate,'" 497 U. S., at 856 (quoting Md. Cts. & Jud. Proc. Code Ann. §9–102(a)(1)(ii) (1989)). Our opinion left open the question of "the minimum showing of emotional trauma" constitutionally required. 497 U. S., at 856. If the lower court's opinion in this case is in the ballpark, the "minimum showing" required is no showing at all, and in all abused-child-witness cases this Court's exception has swallowed the constitutional rule.

The facts are as follows: Jeffrey Steven Marx was charged in separate indictments with sexually abusing B. J., a 13-year-old girl, and J. M., a 6-year-old girl. Before the trial concerning Marx's abuse of B. J., the court held a hearing to determine whether to permit J. M.—who had witnessed the abuse—to testify via closed-circuit television as to what she had seen. At the hearing, the prosecutor asked J. M.'s mother whether J. M. would suffer additional "emotional . . . and psychological trauma," Tr. 68 (Apr. 17, 1995), were she to testify in Marx's presence.

J. M.'s mother initially answered in the affirmative. After defense counsel clarified for J. M.'s mother that her daughter's testimony would deal only with the incidents between Marx and B. J., however, J. M.'s mother indicated that her daughter would be "ready for that":

> "Q. Do you understand we're talking about testifying just in the case that she's a witness in, not in the case in which she was allegedly abused in? Do you understand that?
>
> "A. Yes.
>
> "Q. Okay. And you understand all she's going to be asked to testify to in this proceeding is what she allegedly saw through some window?
>
> "A. Okay.
>
> "Q. Okay. You understand the difference now?
>
> "A. Okay. Well, that does make a difference.
>
> "Q. Well, sure. All she's going to be asked to testify to is what she—
>
> "A. Okay. So this isn't her case?
>
> "Q. No.
>
> . . . . .
>
> "A. Okay. Well, that she's okay with. I mean, she's ready for that.
>
> "Q. I mean, what she saw hasn't caused her any kind of emotional distress or problems, what she allegedly saw through a window?
>
> "A. No. She just—I mean, she could probably do it." *Id.*, at 69.

In addition, Dr. Anita June Calvert, who had examined J. M., engaged in the following colloquy with the prosecutor:

> "Q. Okay. Doctor, do you feel like if she testifies in open court in the presence of Jeffrey Steven Marx,

that she will—the result would cause further serious emotional and physical distress than what she has now?

"A. If no one was ugly to her, you know, made her feel really badly about it—I think [she] is more of a talker than most. She will probably come on and do it.

"Q. Of course, we can make her do that as you well know, but my concern is what would be the emotional and physical distress that would cause—that would be resulting from her testifying in open court in the presence of another.

"A. In the presence of Jeffrey?

"Q. Yes, ma'am.

"A. She tells me she wants to. So unless she gets more frightened than I expect, that little girl would probably testify okay." *Id.*, at 76.

In response to questions from the judge, Dr. Calvert reiterated her belief that J. M. would suffer no additional trauma as a result of testifying.

"Q. Do you feel like there would be any emotional or physical trauma if she were to be in confrontation with the defendant in the ordinary involvement in the courtroom trial?

"A. You mean if she had to go and interact with him or if she just—

"Q. If she had to sit there and testify from the witness stand.

"A. I can't say for sure, but she says she wants to tell what happened, and she's a very strong little girl, strong-willed child like that.

"Q. Do you think she would suffer any emotional or physical problems as a result of that confrontation?

"A. I couldn't guarantee it, but I think—occasionally there's a child who wants to tell their story.

"Q. Listen to my question.

"A. Okay.

"Q. Do you think that there would be any emotional or physical problems with her confronting—testifying from that witness stand and having to confront her uncle?

"A. Your Honor, I couldn't say for sure that there would not be. I wouldn't expect it." *Id.*, at 77–78.

Dr. Calvert subsequently testified that "*if* there was going to be any trauma to [J. M.]" from testifying in the presence of Marx, the risk of such trauma would of course be lessened if she were permitted to testify via closed-circuit television. *Id.*, at 79 (emphasis added). The trial court, without any elaboration, granted the prosecution's motion to allow J. M. to testify outside of Marx's presence. A divided Court of Criminal Appeals of Texas affirmed. 987 S. W. 2d 577 (1999) (en banc).

Quite unlike the child witnesses in *Craig*, who "'wouldn't be able to communicate effectively,'" or who "'would probably stop talking and . . . would withdraw and curl up,'" 497 U. S., at 842 (quoting *Craig* v. *State*, 316 Md. 551, 568–569, 560 A. 2d 1120, 1128–1129 (1989)), the witness exempted by the court below affirmatively "want[ed] to" testify, and by all accounts was "ready for that." If the decision here is correct, the right to confrontation of allegedly abused child witnesses has not simply been, as I suggested in *Danner*, "water[ed] down," 525 U. S., at 1012; it has been washed away.

I respectfully dissent.